Volume XXII] *December, 1907* [*Number 4*

POLITICAL SCIENCE QUARTERLY

RAILROAD VALUATION

PERSISTENT agitation over railroad regulation despite the enactment of the elaborate Hepburn Act scarcely more than a year ago is disappointing to many people, who supposed that this question as a great public issue had been relegated to the background for a few years at least. Yet a little philosophic consideration will show that its persistence is a natural and logical consequence of economic conditions. So far as railroad properties are concerned, we have reached a turning-point in the unfolding of our national economic life. Viewed in a large way, it was inevitable that the issue should arise and that it should do so at about this time. The Hepburn Act of 1906[1] accomplished the first and politically more difficult half of the task. It reëmphasized the principle, half forgotten since the days of Granger legislation a generation ago, that railways are not private properties but are quasi-public corporations and are directly subject to public control. But the Hepburn Act laid down general principles only. It still remains necessary to work out the administrative details, and to extend the principle of regulation, hitherto confined in the main to matters of rates and charges, over into the domain of finance.

The legislative program, so far as railway finance is concerned, which seems likely to engage the attention of Congress, is two-fold. Twin propositions are under discussion, interdependent and both quite different in nature from those of the Hepburn measure. The first of these has to do with the valu-

[1] Analyzed by F. H. Dixon in Ripley, Railway Problems, pp. 531–536.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

ation of railroad property; the second would provide for governmental supervision of railway stock and bond issues. The first, official valuation, is alone of significance in connection with rate-making, albeit even here in a secondary or subordinate capacity. It is at the same time an important adjunct to the reform contemplated in the second proposed measure. It stands thus rather as a means to two ends than as an end in itself. It is a matter of administrative detail, but is nevertheless of primary importance as involving definite economic and political principles.

The railroad rate for a specific service varies in practice between a minimum, fixed by the actual cost of service to the carrier, and a maximum set by what that particular traffic will bear. The rate for hauling a ton of coal from New York to Boston can neither reasonably nor legally be less than it actually costs the railroad to perform the service. To charge less than this sum, so far as it can be determined, would amount to confiscation. On the other hand the upper limit of the freight rate is set by the competitive market conditions. Coal as a commodity would be otherwise transported, a substitute for it would be found, or the community would even forego part of its consumption, if the price were unduly enhanced. The result in any case would be a loss of business to the carrier. The self-interest of the railroad thus sets this upper limit to the rate. Between these two extremes, then, the actual rate will vary. Practically these limits are often undiscernible; and theoretically in many cases they do not apply, as, for instance, for costly commodities in which any increase of the transportation charge would be so small as inappreciably to add to the consumer's price and thus in no wise to affect the demand. But even supposing cost of service and value of service to apply, how shall the reasonableness of any particular rate be determined? To permit a continuance of the rate at the maximum which the traffic will bear—a condition necessary perhaps in a new and sparsely populated country—is likely, with the steady growth of the volume of business, to yield larger and larger net returns. For usually an increasing volume of traffic can be hauled with more and more economy, at least to the capacity

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

of the then existing plant. What is to become of these increasing net earnings as the country becomes settled and the traffic grows? Are they to be made the basis of ever larger dividends to stockholders; or, what amounts to the same thing, are they to permit a fixed dividend on an ever increasing volume of stock and bond issues? Or is the increasing profitableness of the business, owing to its enlarged volume, to be made the basis of a closely corresponding reduction of freight and passenger rates? Either extreme would be not only unfair but also impracticable. The first would unduly tax all shippers for the sole benefit of stockholders; the second would so discourage capital, by withholding from it the prospect of a tempting return, as to hamper the construction of new mileage and the proper improvement of the service. The true solution must recognize the rights of each. To provide a machinery adequate in all its details for attaining this result is the task contemplated in official valuation.

I

In order to appreciate the nature of the present proposition for legislation, one must clearly understand at the outset the difference between a commercial and a physical valuation of railroads. This is best shown by describing the processes adopted in each case. The commercial valuation is gotten by applying to the volume of securities outstanding the market value which they possess. The starting-point is the estimation set upon worth upon the exchanges. Every sort of consideration as to value enters into the calculation. Possibilities for the future, both of good and ill; growth of the country; restrictive legislation; potential competition, even of railways or waterways not yet built; speculative manipulation and a host of other such intangible elements enter into the calculation. Unfortunately it includes also the uncertain factors of varying investment demand, speculation, the state of the money market and the like, none of them affecting the individual properties but bearing upon general trade conditions. The mere rails, terminals and equipment may indeed under such circumstances form but a small part of the total commercial value.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Physical valuation, on the other hand, does not originate upon the exchanges and among traders. It is made by engineers and other experts in the field. It has been aptly termed a bric-a-brac valuation, as distinct from commercial estimates which deal with the property as an indivisible whole. Each separate physical form of property is assigned a value dependent upon its cost and the length of its life. A staff of experts views the real estate; checks up the construction engineers' plans and figures as to cuts and fills in terms of so much per cubic yard for grading; swarms in inspection over the bridges, wharves and ferry boats; rebuilds upon paper the stations and freight terminals; literally counts and measures the rails, ties and telegraph poles; re-audits bills for purchase of locomotives and cars and interprets them in terms of present prices, length of life and depreciation; in short makes an inventory or takes account of stock in precisely the same way and with the same attention to minute detail that a merchant or manufacturer annually devotes to his property. There is no concern for the future; potential earning power is not estimated; nor does chance in any form enter in. The physical valuation is detailed, aims at precision and is matter-of-fact to the last degree. An entirely distinct question as to the valuation of the franchise, over and above the physical plant, will be considered in due course. It raises an entirely different issue.

Physical valuation of railroads by the government after the manner above described is no novel experiment in the United States, involving vast and unknown possibilities of evil, as some Wall Street pessimists would have us think. The demand for it is not a sudden and portentous symptom of an impending socialistic program. No less than three American commonwealths have achieved it without overturning the institution of private property; and in two of them, at least, are located some of the finest and most prosperous railroads in the United States. Texas was the pioneer in this field; and since 1893, according to the report of its railroad commission for 1906, it has succeeded in making an inventory of no less than 11,408 miles out of a total of about 12,000 miles of railway within its borders. Thirty-nine per cent of its mileage was under re-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

ceivership in 1893, when the law was passed. In 1902, only one insignificant road, seventy miles long, which had never recovered from the Galveston disaster, remained bankrupt. The mileage in operation has increased from nine thousand to over twelve thousand miles since the law was enacted. There is certainly nothing fearful in this record. The truly significant feature, however, is that during the period from 1894 to 1906 the average outstanding stocks and bonds have been reduced from $40,800 to $31,530 per mile. In some details the commission appears to have pressed rather hard upon developmental or improvement work[1]; but in the main its influence seems to have been salutary.[2]

These Texas railroad valuations have been made under a so-called Stock and Bond law, of which more anon, passed not primarily with a view to rate regulation but to prevent stock-watering. It is not perhaps without interest to note the contrast in method with the so-called Anti-Stock-Watering law of Massachusetts enacted in the following year. The aim was the same in both cases. Both forbade the issue of new securities without approval of the public authorities. But the laws in each case are indicative of differences in the local situations. Texas, a new and undeveloped country, was be-railroaded by companies, reflecting in the large volume of their securities all the iridescent dreams for the future of the most optimistic pioneers and promoters. In Massachusetts, on the other hand, the stock-watering operators were, so to speak, "accessories after the fact." The roads had originally been most conservatively built. Few if any bonds had been issued. Everything had been paid for in full by stockholders. The threat of an overload of securities as compared with the growth of earnings appeared late in the life of the companies after their reputations had been established. There was no need of valuation, however, in Massachusetts. In this densely populated territory the

[1] Compare the Houston and Texas Central case, wherein it appeared that no charge for betterment, such as replacement of wooden by steel bridges, to operating expenses was allowed. Interstate Commerce Commission Report, 1898, p. 55.

[2] Dr. Miller of the University of Texas describes the situation in the *Quarterly Journal of Economics*, November, 1907.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

high land values for the rights of way, the costly terminals and improvements probably more than equaled the then issued volume of securities. The problem in Massachusetts was merely to prevent stock-watering in future. Texas was endeavoring to atone for the past by restricting new issues until the roads should grow to fit the measure of their obligations. In other words, Massachusetts was applying a close-fitting straight jacket to full-grown corporations in order to prevent future violence; while Texas was withholding bumptious and youthful companies from making new engagements until they had reasonably filled out the garments already on their backs. It was in order, so to speak, to take their measure for properly-fitting financial clothes that physical valuation of their possessions was undertaken. Massachusetts, having no need for such procedure, was content to apply her Anti-Stock-Watering laws without resort to this financial expedient.

Michigan was the second state which provided for a physical inventory of railroad property by law. This was done in 1900, covering some seven thousand miles of line. Wisconsin followed suit in 1903, with an inventory of all the physical property of 6279 miles of line. It should be noted, however, that in both these cases the state legislatures undertook the task neither with a view primarily to rate regulation nor the prevention of stock-watering, but in connection with the taxation of railroad corporations. The pressing demand for an equalization of tax burdens, as between the farmers with visible and tangible possessions alone and corporations with unknown and concealable assets and investments, lay at the root of the matter. It was only after the results were achieved and officially published that the people became aware how imperceptibly the real worth of the railroads had outgrown the amount of their tax contributions to the state treasuries—a condition of affairs non-existent in the East, where railroads are more adequately assessed for taxes. The greatest credit is due to pioneers in this reform, like Professor Henry C. Adams of the University of Michigan, now statistician of the United States Interstate Commerce Commission; and Governor, now Senator, La Follette of Wisconsin. As a result the public finances of the two great common-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

wealths have been reformed and established upon a distinctly higher and more equitable plane. The present interest in the matter, in the larger federal field under the leadership of President Roosevelt, and in some other states as well, as evinced for example by the recent eport of the Sundberg Committee of the Minnesota Senate upon the subject, finds its support, however, in the agitation for control both of rates and security issues. Railroad valuation as incidental to taxation, as a political issue, must necessarily be confined within state lines. As a federal question it can have to do with rate regulation and financial supervision only.

Commercial valuations of railroads by governmental authority, as undertaken by the states, have been in the main based upon earning power or income. For in both Michigan and Wisconsin an additional value, over and above the physical worth of the plant, has been recognized by capitalizing the excess of earnings over those needed to pay a normal return on the value of the actual property. A concrete example may serve to make this clear. Let us suppose that a railroad possessing physical property worth $10,000,000 is earning at the rate of $1,200,000 net a year. Five per cent on the $10,000,000 of actual property, or $500,000, therefore represents the interest return on capital. But there still remains $700,000 of the annual income to be distributed. This would pay seven per cent upon $10,000,000 more of capitalization—a rate of return none too high, perhaps, considering its contingent and fluctuating character. The surplus earning power over and above the normal return on the actual property, thus capitalized at $10,000,000, is the value of the "non-physical" property, that which we may term franchise value. This franchise value in Michigan, it was estimated, amounted to not less than $36,000,000, or 19 per cent of a total value, comprising both physical plant and franchises, of $203,000,000 for the railroad systems of the state. It thus appears that franchise values as such may constitute a fairly large proportion of the total worth of the properties in prosperous parts of the country.

The foregoing computations are not commercial valuations in the full sense of the term. The federal government alone has

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

undertaken that task.[1] Both in 1900 and 1904, in response to the orders of Congress, the Interstate Commerce Commission, and later that body in coöperation with the Federal Census, totalized the market values of every species of railroad stock or bond outstanding in the United States. The inherent defectiveness of such figures is revealed at once upon comparison of the results obtained in the two different years. Thus in June, 1900, the market value of all securities outstanding was $8,351,000,000, while the par value was $11,734,000,000. Exactly four years later, the market value had risen to $11,244,000,000, while the par value stood at $13,213,000,000. No such change in intrinsic worth as this—an increase in market value amounting to more than one-third with an increase of one-eighth in par value—could have ensued within so brief a lapse of time. Nor was the relation between market value and par value in any wise consistent. For in 1900 the securities averaged about seventy cents on the dollar of par. In 1904 this average in relation to par value had risen to eighty-five cents on the dollar. The fact was that a considerable expansion of net earnings had been made the basis of an exaggerated speculative inflation, which was immediately reflected in purely "fancy" quotations upon the exchanges. Moreover, in many instances, unduly inflated prices had been caused by competitive purchases of stocks by rival lines, for purposes of control rather than for investment. For many of these securities, even in normal times, any attempt to realize such prices would at once have caused a ruinous decline in quotations. The totals above named, therefore, must be regarded as in many respects fictitious and misleading. They are of interest, perhaps, as showing changes in market conditions from year to year, but not as possessing the static value which attaches to a physical inventory. No reliance whatever can be placed upon them as a basis for regulation of rates, for issues of stocks or bonds or for taxation.

Having seen how extensive the experiments in state valuation of railways have been, it is next in order to examine the results,

[1] In Massachusetts the state tax commissioner makes an inventory annually of the market value of all stocks, but not of bonds. The record is therefore incomplete.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

reduced so far as may be to a basis of miles of roadway or line. The following table embodies these, figures denoting dollars:

	U. S. 1900	U. S. 1904	Wisc. 1903	Mich. 1900	Texas 1906	Minn. 1906	Ohio 1903
Physical valuation.							
Cost of reproduction, new	.....	.....	30,900	26,100	16,531		
Present condition	.....	.....	25,500	21,500	.....	27,000	
Physical plus non-physical value[2]	.....	.....	.....	25,800			
Commercial valuation	43,200	52,600	40,400[1]	32,100[1]	20,100[1]	59,800[1]	75,000[1]
Capitalization, par	60,600	.....	.....	.....	.....	50,000	

Taking state by state, it appears that there is a wide margin between the present value, or even the cost of reproduction new, and the commercial valuation. In Michigan, for example, the present value per mile was $21,500; the cost to reproduce new was $26,100; the present value of physical property plus the non-physical (franchise) elements was $25,800—not very different, it will be noted, from the cost of reproduction new—while the value set by traders on the exchanges in 1904 was $32,100. For Wisconsin the gradation is about the same, although all figures seem to be upon a higher plane. Perhaps this is because Michigan contains mainly intermediate roadway and line, while Wisconsin includes more valuable terminals. Texas, as might be expected, is represented by properties worth very much less per mile, while Minnesota, and especially Ohio, range much higher. But the important point is not the comparison between states, but between the physical and commercial values for the same properties. So far as one may venture to generalize from the two states for which the data are exact,

[1] In part from U. S. Report on Commercial Valuation of Railway Property, 1904, p. 87. The Third Biennial Report of the Wisconsin Tax Commision, 1907, pp. 82 and 269, is authoritative. For Ohio, compare with $71,000 computed by Bemis in 1903 for Mayor Tom Johnson. For Minnesota, the Sundberg Senate Committee conclusions are given. For Texas, they are official, from the State Railroad Commission.

The U. S. results for 1900 are to be found in 57th Congress, Second Session, Senate Doc. no. 178. The U. S. results for 1904 are reprinted in the Nineteenth Annual Report of the Interstate Commerce Commission, 1905, p. 88.

[2] U. S. Report, 1904, p. 78, by taking as divisor miles of main track plus branches.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Michigan and Wisconsin, the purely commercial valuation was about fifty per cent in excess of the worth of the physical plant. For Texas, assuming present value to stand in about the same relation to cost of reproduction as was precisely computed in the other states, and hence to be about $12,500 per mile, the foregoing conclusion would be confirmed; for an addition of fifty per cent to such a value for the physical property would just about equal $20,000, representing the market value of securities as determined by the federal investigation of 1904.

Various expert computations have been made as to the probable average cost of railway construction in the United States. There are probably few if any parts of the country where $10,000 per mile will even grade the roadway and lay one line of rails. Competent authority may be found for estimates applicable to more general and varied conditions of $30,000 per mile of single track.[1] But such generalizations are of slight value when applied to particular cases, especially those involving expensive terminals, duplication of tracks and especially high costs of financing under unfavorable market conditions. The enormous expenditures per mile in order to secure entrance for the Wabash road into Pittsburg five years ago are a case in point. Reliable data in most cases are almost impossible to secure, and the book costs are of course worthless. A few stock dividends like that of the Louisville and Nashville road in 1880, by which the "cost of road" was arbitrarily increased by twenty million dollars by a stroke of the pen, easily upset all calculations based upon such figures. The fact is that few if any railroad companies actually know what their properties cost, quite aside from the uncertainties incident to large additions and improvements charged to operation and paid out of current income. Nevertheless, such data as are obtainable, taken in connection with the figures above cited for physical valuations, seem to warrant the generalization that, for the United States as a whole, $30,000 per mile of single track fairly represents the

[1] Various engineers' conclusions are cited in *Journal of Accountancy*, March, 1906, p. 379. Newcomb, in *Gunton's Magazine*, 1900, p. 500, gives $25,000 as sufficient. *Vide* also *Yale Review*, 1902, p. 172. Poor, twenty years ago, set it at $40,000. Cullom Committee, I, p. 675.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

reproduction cost of the properties. This would certainly fall as low as $20,000 in the open prairie country, and might rise to three times that figure or even more in rugged areas or in densely populated states. For exceptional cases like the approaches to New York or Pittsburg all calculations fail.[1]

A comparison of the foregoing figures for physical valuation and cost with those of present capitalization per mile requires important qualifications at the outset. In the first place the units of comparison must be definite. To compare cost per mile of single track with capitalization per "mile of line" or of "main line" may be entirely misleading. The Pennsylvania company recently reported 4877 miles of extra and siding track in addition to its 3679 miles of first track. Here is a possible error in comparisons of over 100 per cent, unless the additional cost of such trackage be added to that of "roadway" or of "main line." Then the cost of equipment, often as high as $10,000 or $12,000 per mile, must be added to the cost of roadway. Expenses of financing, such as the necessary sale of bonds below par, commissions to bankers and the like, must always be reckoned in. The Western Pacific, for example, will doubtless not receive over $40,000,000 in cash from the sale of $50,000,000 of four-percent bonds. Here is an expense of $10,000,000 when the bonds fall due. The two or three years of costly construction of the new Pacific extension of the St. Paul road will bring no proportionate return until the line is all in operation; yet interest charges continue night and day throughout the entire time. All these considerations are important and may often warrant a capitalization of $40,000 or more per mile of line merely on the basis of legitimate cost.

There still remains to be made, however, the most important correction of all. Net capitalization, after deduction of the value of investments, or property owned outside of its railroad equipment, must always be obtained. The earliest and long the most conspicuous example of investment of this sort was the Philadelphia and Reading Railroad, with its extensive reserves of coal lands purchased by the sale of bonds, capitalized

[1] *The Journal of Accountancy*, V, 1906, pp. 379–386, is suggestive on this.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

in 1906 at over $300,000 per mile of line. Part of the enormous burden of capitalization of the Erie ($175,000 per mile) and of other anthracite coal roads is due to the same cause. More recently, since 1897, and in large measure as a result of consolidation by purchase of stocks in other companies through issue of collateral trust bonds, the deductions from gross capitalization for "securities owned" in order to obtain net capitalization have attained large proportions. The total volume of stocks and debt of all railroads in the United States outstanding June 30, 1905, was $13,805,000,000, or $65,926 per mile of line. But of these securities no less than $2,638,000,000 represented stocks and bonds of railroads not in the hands of the public but owned by other railroads. This figure, amounting to not less than $12,100 per mile of line, reduces the net capitalization to less than $54,000 per mile, a much more modest figure. A few specific instances will serve to illustrate our point.[1] The gross capitalization of the Pennsylvania Railroad in 1906 was about $110,000 per mile, but of this sum about $60,000 stood for security holdings, leaving a net capitalization of only about $50,000 for a system of largely two and often four tracks. In a similar way the apparently heavy capitalization of $95,000 per mile of the New York Central shrinks to less than $60,000 when allowance is made for investments equal to nearly $40,000 per mile. The most conspicuous example of this kind is of course the Union Pacific company. Practically one-quarter of its net income in 1906 was derived from investments, enough in fact to permit payment of its fixed charges and the customary four-percent dividend on the preferred stock without moving a ton of freight or carrying a passenger.[2] Without approving in the least of the dangerous financing by which this result was obtained, one must nevertheless concede that its gross capitalization of $133,000 per mile of line in 1905 needs substantial correction before comparisons may be made with other roads not engaged in a general banking and brokerage business. Similarly a comparison is worthless between two

[1] *Journal of Accountancy*, March, 1906, p. 381.

[2] *Quarterly Journal of Economics*, XXI, 1907, p. 612.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

such roads as the Boston and Maine and the New Haven system. Entirely aside from the facts that the former is mainly single-track while the latter has much four-trackage; that the one has always avoided grade-crossing abolition and similar public-spirited improvements while the other has expended millions of dollars for such unproductive purposes; and that the Maine system is a loose combination of leased lines while the New Haven has bought up and consolidated itself by purchase of subsidiary companies, the investments in other properties of the consolidated road form a large proportion of its outstanding securities. In four years prior to 1907, according to the testimony of President Mellen before a Massachusetts legislative committee,[1] not less than $157,000,000 in capital had been raised by sale of securities, of which $103,000,000 had been expended for investments in other companies and $10,000,000 for real estate for terminal purposes. Distribute this sum over the line mileage of the company, and a deduction of a large amount from its gross capitalization would be the result. Similarly in every case it is imperative in any close analysis to deal with the net capitalization and to place no reliance whatever upon gross figures.

Eliminating the anthracite coal roads and the banking or investment railroads, it does not appear that capitalization of most American companies is excessive at the present time as compared either with their cost or their value. Especially is this true of conservative companies like the Chicago and Northwestern and the St. Paul systems. The former, in 1905, had outstanding only about $31,500 of stocks and bonds, the latter, $33,200 per mile of line; while the Great Northern's capitalization then stood at $40,600 for the same unit. All of these companies have more recently, however, considerably expanded their issues by sales of shares to stockholders at par; but evidence is lacking to prove that the sums thus raised have not been properly reinvested in improvements, such as the new Chicago terminals of the Northwestern or the Pacific coast extension of the St. Paul. There still remains, of course, a fair

[1] June 1, 1907.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

number of companies like the Southern Railway with over $70,000 of securities outstanding per mile of line in 1905; the Wabash with $98,108, and the Baltimore and Ohio with $108,000. Even making all due allowances in these cases and for some transcontinental lines like the Union and Southern Pacific, the conclusion that their capitalization is excessive cannot be avoided. But for the country at large the general conclusion seems well founded, that most of the companies have within the last decade grown in value to fill out the measure of their capital issues. Directly remedial measures seem hardly necessary under such circumstances, although precautionary ones as a safeguard for the future may not be out of place.

As concerns the relation between present values and original cost, a tendency is apparent among state commissions to refer to the original cost, rather than to present worth, as a basis for computations, and to disregard franchise (or non-physical) values entirely. Massachusetts, as we have seen, allows no recognition of franchise values at all.[1] Texas makes no allowance for depreciation but bases conclusions entirely upon first cost.[2] The present intelligent Wisconsin railroad commission in its far-reaching two-cent-fare decision,[3] accepted full cost of reproduction, making no allowance for depreciation, in lieu of recognizing any franchise value; in this respect being apparently supported by the results of the Michigan commission, which show that the present value of physical property plus the non-physical (franchise) values just about equals the cost of reproduction new.[4] In other words, the allowance for depreciation was practically an equivalent for the computed value of the franchise.

The fact of an apparent difference of approximately fifty per cent between the commercial and physical valuations of railways

[1] For fuller treatment, *vide* Ripley, Trusts, Pools and Corporations, pp. 121–148.

[2] Railroad Commission Report, 1906, p. 23; R. A. Thompson, Texas Academy of Sciences, Oct. 24, 1902, pp. 331 and 351.

[3] Page 164 of separate reprint. But compare 3rd Biennial Report Wisconsin Tax Commission, 1907, p. 92.

[4] U. S. Report on Valuation, p. 78. *Cf.* also, Eaton, Railway Operations, p. 296, for a defence of original cost as a basis of calculations.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

has been already noted.[1] This represents the estimated worth of what we have termed franchise value. Should this be capitalized, that is to say, made the basis for issue of securities? As a matter of past history the answer is of course affirmative. Capitalization of our railroads in the main not only fully equals the commercial valuation but, as we have seen, often greatly exceeds it. A nice question, pressing for solution in many states, arises at this point. If this surplus representing franchise valuation is real enough to be capitalized, ought it not in all fairness to be subject to taxation? Massachusetts avoids this issue entirely by its salutary Anti-Stock-Watering laws, which aim to hold the capitalization down to the measure of actual investment in property. Franchise values as such are not permitted to emerge. New York, since the law taxing franchises of public-service corporations was passed under the leadership of then Governor Roosevelt, has endeavored to tax franchises; but the new Public Utilities law of 1907 expressly adopts the Massachusetts principle and for the future forbids the capitalization of franchises at all.[2] It avers that franchise values may be expressed in the form of increased earnings but not in augmented capitalization. The task of its newly-created administrative commissions henceforth will be like that of the Texas railroad commission; namely, to restrict further issues of stocks and bonds until the companies have grown to fill out the measure of their security issues. And in this connection it may be added that Texas has accomplished very definite results in this way. Whereas the average capitalization of its roads per mile in 1894 was $40,802, this has actually decreased, despite the growth of its systems, to $31,530 per mile in 1906.[3] Such a positive decline of about twenty per cent in its average capitalization per

[1] Page 586 *supra*.

[2] *Vide*, *Nation*, March 23, 1907, for the master's decision in the Eighty-cent Gas case. The Metropolitan Interborough consolidation was effected under the general business law, to avoid the necessity of making a fair valuation as called for by even the old railroad law of New York state.

[3] State Railroad Commission Report, 1906, p. 26. Compare however the Texas Railroad Commission Cases of 1897, discussed in Interstate Commerce Commission Report, 1898, pp. 53 *et seq*.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

mile, it is safe to say, cannot be duplicated in any other state in the Union. May the great state of New York, under the beneficent action of its new regulative law, succeed in like measure in squeezing out some of the water from its capitalizations.

Wisconsin under the La Follette régime has aimed to make the rules for capitalization and taxation work both ways. Any possession, physical or intangible, which may be made the basis of security issues, is held to be taxable. Many other American commonwealths have shown tendencies in the same direction.[1] In Georgia, for example, a franchise tax has been regularly levied since 1903 in addition to that on the physical property. The franchise of the Southern Railway was in that year assessed at $6,588,000, as against $10,388,00 levied on tangible possessions. The Kentucky state board of valuation and assessments deducts the value of the property (how estimated?) from the total capitalization, leaving a sum which it assesses as franchise. On the Louisville and Nashville this franchise tax once amounted to $9,511,000, while the real property was assessed at $23,059,000. There can be no doubt that, except in some of the Eastern states, railroad properties have largely evaded their just proportion of taxes. And it is to be hoped that this agitation over valuation, if it have no further result, will serve to stiffen up the assessments to their fair proportions to the rates on other forms of property. In Texas, for example, where, as we have seen, the actual inventory of railroad property has been most conscientiously made, as late as 1902 it appeared that, while the capitalization per mile was $34,170 and the valuation by inventory was $15,975, the assessment for taxes was only $8742 per mile.[2] In Ohio, one authority states that taxes on railroads amount to only about one-fifth of the commercial value of their outstanding securities.[3] The Federal Census in 1904 adds to its commercial valuation of railroads an interesting table of comparisons with values for purposes of

[1] *The Railway Age*, August 28, 1903, contains a good summary of these laws.

[2] Texas Academy of Sciences, Annual Address by the President, Oct. 24, 1902, p. 13.

[3] Report on the True Value of Ohio Railroads for the Purpose of Taxation, by Edward W. Bemis and Carl H. Nau, Cleveland, 1903, p. 2.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

taxation in the different states.[1] In only one of them, Connecticut, is the commercial valuation less than that for taxation, Is this perhaps a partial explanation for the zeal of the New York, New Haven and Hartford Railroad in making an inventory of its property? Outside of New England, the only states with a proportion of taxable assessment to commercial valuation as high as 60 to 70 per cent are Illinois, Michigan, Wisconsin and New Jersey. A few others—Georgia, Indiana, Kentucky and Texas—assess their railroads at from forty to fifty per cent of their commercial value; while most of the remainder range from seven per cent, as in Wyoming, to 38 per cent in Virginia. In New York the assessment in 1904 was only 25 per cent of the market valuation.

Some railroad men insist that inventories made for the two distinct purposes of taxation and commercial valuation need not agree in fact. An interesting illustration is afforded by the case of the Louisville and Nashville Railroad in Florida. It appears that in 1902 a return of value for purposes of taxation was made to the state comptroller, which was only one-half the amount returned under oath shortly afterwards to the United States district court in an application for an injunction against the enforcement of a statute reducing railway rates. The railroad attorneys claimed that the two bases were entirely different, owing to the fact that much of the property was unremunerative. The company, it was alleged, was entitled in matters of rate regulation to insist upon a reasonable return on the cost of reproduction of its property at least—a basis which might be highly excessive as a basis for assessment of taxes if the road were being operated at a loss.

There can be little doubt that much of the opposition of the railroads to any project for federal valuation is due, not so much to apprehension as to its effects upon rates, as to the fear that it may lead to enhanced taxation. And certainly the experience of Michigan, Wisconsin and Texas tends to confirm that view. To the impartial student, however, impressed as he must be both by the wholesale evasion of proper taxes by railroad

[1] U. S. Report on Valuation, p. 14.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

corporations in many states and by the radical inequalities in assessment incident thereto, this phase of the matter commends the project more strongly. Taxes need not be ruinously high, if all parties subject pay their just proportion. Any federal action which shall contribute to equality of assessment as between the different states cannot fail to be wholesome in its effects.

II

That some valuation of the property or investment of railroads is not only theoretically but also practically a prerequisite to the determination of reasonableness of rates is demonstrated by three facts. In the first place, such valuation is commonly introduced by the railroad attorneys themselves as a main line of defense against proposed reductions. The direct issue of valuation has thus time after time been forced upon the public at the initiative of the carriers. Secondly, as thus presented, it has frequently been adopted by administrative commissions as a basis for the determination of rate controversies. And, finally, with the supersession of administrative by judicial settlement, the courts also have been forced to consider the same line of argument and, in fact, to treat it as fundamental.

Many concrete instances of reliance by legal counsel upon the investment value of railway properties as a defence against rate orders or statutes might be cited. One of the most recent is the argument of the attorneys for the Northern Pacific Railroad before the Interstate Commerce Commission in the matter of rates to Spokane, Washington. A majority of the members of the commission is reported to have changed its views and to have become convinced of the need of official governmental valuation by the urgency with which this side of the case was presented by counsel for the road.[1] The long-contested Danville, Virginia, case contained much reasoning of the same sort. Not only is the argument based upon a reasonable return upon the value of the property presented in an informal way before administrative commissions, but it is urged by counsel in most of the cases in the courts. For example, in one of the

[1] *Boston Transcript*, May 10, 1907.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

earlier Supreme Court cases,[1] touching the constitutionality of a three-cent-fare statute of Arkansas, counsel for the carriers argued that the reduced rates would not yield one-and-one-half-percent returns on the "original cost" of the railroads. In Covington *etc.* Turnpike Company *v.* Sandford, in 1896,[2] it was represented by the attorneys of the company that the reduced tolls would not permit two-percent dividends on the par value of its stock. This of course immediately raised the issue as to the value of the investment in its relation to capitalization. Another common line of defence, adopted in the Great Northern case before the supreme court of Minnesota in 1896, is the attempt to show that a road could not earn its fixed charges upon bonds under the new rates. This again at once refers the matter back to the underlying question of the relation of bond issues to the value of the real property mortgaged. In this Minnesota case the questions of original cost and of present value formed a large part of the reasoning contained in the decision of the court.[3] The Sundberg Minnesota Senate Committee of 1907 on Value and Cost of Railroads bases its conclusions almost entirely upon considerations of the same kind.

Reliance by administrative commissions, both state and federal, upon considerations of value of the property is extremely common. Obviously, if urged by counsel for the carriers, the argument would be given great weight. But even where not so presented by the railroads, the commissions have sought firm footing for their decisions upon positive data of this kind. The need for it in official form, as we shall see, led the state of Texas, as far back as 1893, to confer authority by statute upon its railroad commission to proceed to make such valuations whenever needed. The Virginia corporation commission in promulgating very recently an order for two-cent fares per mile, proceeds upon the assumption that a six-percent return on a maximum capitalization of $50,000 per mile is all that need be permitted as a reasonable return to capital.[4] The statement is made that the Norfolk and Western is earning six

[1] Dow *v.* Biedelman, 125 U. S. 680. [2] 164 U. S. 578.

[3] *Vide* 13th Annual Report, Railroad and Warehouse Commission of Minnesota.

[4] *Railway Age*, May 10, 1907.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

per cent on $98,000 per mile; the Chesapeake and Ohio, a similar rate on $82,000 per mile, and so on down to the Southern earning six per cent on $45,000 per mile. But the argument, however sound, is based upon no concrete data whatever of the sort under discussion in this paper. A far better instance of the need and value of such information is afforded in the recent Wisconsin two-cent fare-order.[1] This elaborate opinion, so thorough and judicial in its presentation of all sides of the case, is noteworthy as analyzing the elements of cost and present value to the last detail. Cost of service is sharply distinguished from cost of the property, the latter of course forming only a small element in the expenses incident to the service. The elaborate report is a model: it is in itself the strongest possible argument for the application of similar scientific processes to the larger problems of control of public-service corporations of all kinds. Governor Hughes' recent and salutary veto of the New York law establishing two-cent passenger rates throughout the state was based, not upon the unreasonableness in itself of such a rate, but upon the entire absence of any concrete data as to value of the investment in its relation to the present or prospective returns.

An examination of the cases in both federal and state courts reveals the ever-pressing nature of this issue as to valuation as a basis for the judicial determination of the reasonableness of rates—an insistency which in fact finally forced a reluctant judiciary to take evidence upon the subject either directly or through masters appointed for the purpose. Primary responsibility seems to have been evaded by the federal courts prior to the Maximum Freight Rate decision in 1897. But when the Supreme Court of the United States finally by this pronouncement, in denying rate-making powers to the Interstate Commerce Commission, laid the burden definitively upon the judicial arm of the government, the courts were compelled to seek information concerning cost, valuation or investment as a basis for their decisions. The gradual development of the matter is instructive. The earlier condition of irresponsibility is shown

[1] Buell *v.* C. M. & St. P. R. R., decided Feb. 16, 1907, pamphlet, p. 191.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

in a Supreme Court case, dealing with the validity of a statute of Arkansas, fixing a maximum passenger rate of three cents a mile. Said Justice Gray, in delivering the opinion: "Without any proof of the sum invested by the reorganized corporation or its trustees, *the court has no means*, if it would under any circumstances have the power, *of determining that the rate of three cents a mile, fixed by the legislature, is unreasonable.*"[1] Six years later, in the leading Texas Railroad Commission case, the facts appeared plainly to show inadequacy of the rates to yield a fair return upon the investment. General figures sufficed, and yet the issue as to precise valuation loomed up in the background, ready to obtrude itself in a more doubtful case. Justice Brewer, in holding the rates unreasonable and hence void, said:

> Is there anything which detracts from the force of the general allegation that these rates are unjust and unreasonable? This clearly appears. *The cost of this railroad property was $40,000,000; it cannot be replaced to-day for less than $25,000,000.* There are $15,000,000 of mortgage bonds outstanding against it, and nearly $10,000,000 of stock. These bonds and stock represent money invested in the construction of this road. The owners of the stock have never received a dollar's worth of dividends in return for their investment. The road was thrown into the hands of a receiver for default in payment of the interest on the bonds. . . .
>
> It is unnecessary to decide, and we do not wish to be understood as laying down as an absolute rule, that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable. . . . There may be circumstances which would justify such a tariff; there may have been extravagance and needless expenditure of money; there may be waste in the management of the road; enormous salaries, unjust discrimination as between individual shippers, resulting in general loss. The construction may have been at a time when material and labor were at the highest price, *so that the actual cost far exceeds the present value;* the road may have been unwisely built, in localities where there is no sufficient business to sustain a road. Doubtless, too, there are many other matters affecting the rights of the community

[1] Dow *v.* Beidelman, 125 U. S. 680, at 690. The italics are the writer's.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

in which the road is built as well as the rights of those who have built the road.[1]

It is by no means clear in this case what evidence was presented concerning valuation, how far the actual cost exceeded the present value, or how legitimate were the expenditures made for construction or operation at various times. The same indefinitiveness and hit-or-miss economic procedure appears in Covington *etc.* Turnpike Company *v.* Sandford, taking issue in 1896 as to the reasonableness of tolls fixed by act of the legislature of Kentucky. Justice Harlan here rendered the decision of the court. He stated, among other things, that the answer of the company

alleged that the receipts for the several preceding years had not admitted of dividends greater than four per centum on the par value of the company's stock; that the act of 1890 reduced the tolls 50 per cent below those allowed by the act of 1865; and that such reduction would so diminish the income of the company that it could not maintain its road, meet its ordinary expenses and earn any dividends whatever for stockholders. These allegations were sufficiently full as to the facts necessary to be pleaded, and fairly raised for judicial determination the question —*assuming the facts stated to be true*—whether the act of 1890 was in derogation of the company's constitutional rights. It made a *prima facie* case of the invalidity of that statute.[2]

In various dicta the court manifested a certain hesitancy in pronouncing upon the economic issue involved, in fact taking no evidence whatever independently.

It was clear that the time for such evasion of responsibility was past. The law could not continue to dodge the economic principles involved. In the same year, 1896, in a leading case before the supreme court of Minnesota, concerning the reasonableness of rates fixed by the Railroad and Warehouse Commission for the Great Northern Railway Company, detailed evidence as to valuation and investment had to be taken.[3] A decision could be reached only "by ascertaining what, under all the circumstances, is a reasonable income on the cost of reproducing the road at the present time." Whether cost of

[1] Reagan *v.* Farmers Loan and Trust Company, 154 U. S. 362, at 411. The italics are the writer's.

[2] 164 U. S. 578, at 595. Again the italics are the writer's.

[3] Reported in full in 13th Annual Report of Minnesota Railroad and Warehouse Commission.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

reproduction is in fact the proper basis is a question that may for the moment be left open. The point to be noted is that some precise economic data were absolutely essential to a just settlement of the controversy.

In 1898, for the first time, the Supreme Court of the United States was compelled to such action, itself taking expert evidence instead of merely following the admissions or allegations of parties to the suit. A Nebraska statute had prescribed a reduction of rates, against the enforcement of which an injunction was demanded. The decision of the court was based directly upon the economic data presented. In the course of the opinion, Justice Harlan summed up the case in the following oft-quoted passage, which in itself shows how fully the necessity for official valuation in all such controversies was appreciated by the court:

> We hold, however, that *the basis of all calculations as to the reasonableness of rates* to be charged by a corporation maintaining a highway under legislative sanction *must be the fair value of the property being used by it for the convenience of the public*. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in such case. We do not say that there may not be other matters to be regarded in estimating the value of the property. *What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience*. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth.[1]

Two later cases in the Supreme Court, in 1899 and 1901, reiterate the same principles as to valuation and take detailed evidence through masters as to the economic facts.[2] Thus it

[1] Smyth *v.* Ames, 169 U. S. 466, at 546. Again the italics are the writer's.

[2] San Diego Land Company *v.* National City, 174 U. S. 739; and Cotting *v.* Godard, 22 S. C. Rep. 30; 183 U. S. 79.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

appears that the settled judicial practice has come to be that, before applying the law in matters of regulation, the precise economic data both as to valuation and earnings are essential.[1]

III

But why consider valuation of the property at all if the facts as to current earnings are known? The latter are at once easier to obtain and less open to dispute. Moreover, in point of fact, do not current earnings furnish the real basis for present valuation? Why attempt to go back of income at all in our search for an equitable basis for charges? This brings us at once to the crux of the matter in point of economic theory. What has the valuation of railroad property to do with the regulation of railway rates? Such rates, as is well known, are not made primarily on the basis of cost of service but flow from a complex variety of circumstances. The amount which the New York, New Haven and Hartford Railroad may charge on a case of shoes from Boston to New York bears no direct relation to the value of its property. The dependence, if there be such, is rather the reverse. The worth of the railroad depends upon what it may charge for the service, and that, in turn, runs back to the value of the goods in themselves, to the effectiveness of water competition, to general trade conditions and a multitude of other considerations too numerous to mention. In fact, the cost is entirely indeterminable for any specific shipment. But when the issue becomes one, not of *particular*, but of *general* rates, the matter appears somewhat different.[2] Is a general ten-percent increase of charges on all the railroads of the country, such as occurred, for example, after 1900, reasonable or no? Are all the rates into the South from Middle Western cities like Chicago and Cincinnati too high in proportion to all the rates into the same quarter of the United States from Boston,

[1] Professor Bruce Wyman of the Harvard Law School has cogently expressed this as follows. He says, "the public service law will not be satisfied in the end unless with some reasonable degree of certainty each applicant who requires a service is charged his proportion of the total cost, including in that cost, over and above all current and fixed charges, *a fair return upon proper capitalization*." (Writer's italics.) *Harvard Law Review*, XX, 1907, p. 523.

[2] *Cf.* Taussig's chapter on "The Theory of Railway Rates," reprinted in Ripley, Railway Problems, p. 126.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

New York and Philadelphia as competing centers on the seaboard? Can the carriers afford to reduce the entire schedule, supposing it be in their power arbitrarily to do so? Such are the problems into which the element of cost of service and the item of valuation of property enters. Take the first one, for example. The traffic of the country, in view of prevalent prosperity, may be "able to bear" the change; in other words, trade may not be injuriously hampered by the rise of charges. But does this consideration alone suffice? The railway men of course allege that it does. For them, "charging what the traffic will bear" is the sole criterion of reasonableness. But for the shipper and the general public another query presents itself. Are not the steady increase in population, the filling up of the country, the greater density of traffic, leading to such increased net earnings that the railways should share a part of their growing profits with the public which confers the privilege of the franchise? According to this argument, we are dealing with a case of partnership between private investors and the state, representing the people. In view of the guarantee of future earnings, due to the steady growth of business, ought not the public to benefit in some equitable proportion by the profits which accrue? Here is material for controversy of first-class proportions. The Interstate Commerce Commission is called upon to settle it; and the issue is then immediately transferred to the federal courts for final arbitrament. What standards are to be applied to the determination of such a question?

The real value of the investment is almost inevitably injected into such a controversy over rates. No one questions the right of capital to a generous return; and, so long as the risks in opening up a new country were great, the return to the investor was justly high in proportion. But the railways of the United States as a whole are now no longer *speculative* but rather *investment* propositions. They would be far more so, had the activities of stock-watering been properly restrained. Theirs is not a private but a quasi-public business. No sooner is a generous return to capital guaranteed by the growth of business than the public presents its demand for a share in future prosperity, either by improved service or reduced rates. But

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

where draw the line for a "generous return to capital," until the amount of the investment has been at least approximately fixed? At just this point the plea is entered for a valuation of railway property. It has no reference whatever to the fixing of any specific rates for a given item of business. That is a question of proportion between all the varied services which together contribute to the total gross receipts. This issue as to valuation, on the other hand, underlies the entire matter from a wider point of view. It fixes a reasonable average elevation, above and below which the specific charges may vary according to circumstances. The carriers have been earning, let us say, $100,000,000 net annually. Their profits have now risen to $120,000,000. Interest on bonds and dividends on stocks absorb much of this; but new issues at par to stockholders, as by the Great Northern Railway in Minnesota, are perhaps proposed in order to raise funds for improvements. Is the property, judged by any fair criterion, really worth $1,500,000,000? In that case the return to the investors at eight per cent is generous but, in view of all the facts, not exorbitant. But if, by the most liberal estimate, the value of the roads as going concerns is only $1,000,000,000, a rate of return of twelve per cent is certainly too high. It is time that the public should share in the profits. There are grade crossings to be eliminated; new stations and better equipment are needed; and above all, safety for life and limb demand consideration. Real, not dummy, block-signal systems should be installed, and heavier steel bridges provided. Valuation of railway property may be of importance in every one of these cases, as well as for purposes of taxation, long before it obtrudes itself into controversies over rates.

The next question is, granted in theory the desirability of such a valuation, how shall it be made? Is it possible in practice to do justice to so complicated a problem? Aside from merely normal growth in value, how can one hope to comprehend in one set of figures all the experimentation, crudities, blunders, wastes and perhaps frauds of a half-century of railway finance? Original cost certainly is inadequate as a measure. Relatively little cash aside from borrowings on bonds was some-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

times risked in the enterprises at the outset. The land cost nothing. The government gave substantial aid. Yet no one would deny large rewards to the children's children of those pioneers who opened up a wilderness to settlement and civilization. But the present worth of these properties may exceed the wildest dreams of the builders and promoters. Do we turn to the present cost of reproducing the properties, we are again appalled at the logical difficulties. What would these valuable rights of way and terminals now be worth, merely as real estate, were the lines torn up? How large a part of the earning power —which of course in the last analysis really fixes the market value—is due to good will, established connections and contracts? The problem bristles with difficulties too complicated for discussion in this place. But so also does that of the tax assessor, as well as that of the banker who is called upon in a private capacity to undertake the same task.[1] The problems are all closely akin in nature. The issue before us, like these others, demands some approximate conclusions in spite of the difficulties. All that can be done is to credit fully every asset, and from all the totals, computed by various means, to choose that one which shall most fully recognize the right of private property to a fair return. This must be done. It is imperative. For otherwise the Supreme Court and the fourteenth amendment will overset all our results. Herein lies the reason why, in my modest opinion, "capital" need have no apprehension about the result so far as present values are concerned. Such an appraisal, when made, will safeguard the future in the public interest, not retaliate upon the past. Would that such a valuation had been made before the scandalous merger of the New York traction companies. The merger could then never have been effected, and heavy loss to investors would have been prevented.

The railway men allege that physical valuation of railroad property is not only needless—a waste of energy—but that it is misleading, nay even vicious, in principle. Let me quote from one of them, the president of one of our largest systems. "The

[1] The U. S. Report on Valuation of Railway Property, at p. 53, contains an outline by an expert of similar valuations made by bankers for purposes of reorganization.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

value of all property," he says, "is determined wholly by the use that is made of it. As applying to the transportation problem, this would mean that, while the rates charged and the business that is done may determine the value of the railroad, the reverse is not equally true." Another railroad authority puts it this way:

The value of a railroad, viewed as a single asset, is its earning power capitalized, and nothing else whatever. Reduplicate the main lines of the New York, New Haven and Hartford in the Rocky Mountains, and you will certainly double their so-called physical value if you measure that value by cost of construction. Against the tremendous asset representing the physical cost, place an equal amount of liabilities representing securities sold to pay the bill, and you will have a perfect balance sheet; also a company that cannot possibly remain solvent, for the earnings in the mountain country will be as much smaller than they are in New England, as the construction cost will be greater! Yet this *reductio ad absurdum* is the valuation plan in a nut-shell.

Of course the valuers must do more than estimate construction plus cost of property once used but now discarded. They must also reckon the intangible assets that make a cheap railroad in New Jersey worth more than a dear one in Colorado. These intangible assets include the fact of possessing exclusive privileges, franchises and territorial monopolies. To obtain a New York terminal the Pennsylvania Railroad is spending, let us say, one hundred times as much as the New York and Harlem Railroad spent for the same purpose, because the New York and Harlem Railroad was first on the ground, and acquired a territorial monopoly. The possession of a favored mountain pass, or the bank of a river, is fought for by rival construction companies as if they were armies of occupation, yet these advantages do not appear in the balance sheet of the completed railroad. How is the valuer to appraise them? It is clear enough that he cannot do so by any process worthy of a title more dignified than guesswork. And so we are to measure earthwork, weigh rails, appraise real estate, and then add to this list of tolerable exactness a perfectly arbitrary sum, of more consequence than all the rest together, representing the intangible assets; a process which may be likened to a computation of the circumference of a circle by pacing off the radius and carrying out the formula to four places of decimals.[1]

[1] *Atlantic Monthly*, August, 1907, p. 162. See also *Bankers' Magazine*, July, 1907, on "Railroad Valuation."

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Such reasoning, it is submitted, entirely misses the main point at issue. No proposition has been made to evaluate *commercially* the entire railway wealth of the land either wholly or road by road. That, as we have seen, has already been done twice for the country at large by the federal government, in 1900 and 1904. There is no question whatever that this commercial value depends in large measure upon the present or future income-producing capacity of each property, and, furthermore, that it is the use made of this property and neither its original cost nor its present cost of reproduction that fixes its present worth. The plan of valuation under consideration seeks not to find the *total* value at all, but to discover *what part of it is represented by real property and what part by intangible assets.* Merely to make use of the total value as dependent upon net income as a basis for regulation would, of course, as the railroad men allege, involve reasoning in a vicious circle. Once we admit evidence as to *total* market value—a direct expression of earning power—and, Münchausen-like, we are trying to lift ourselves by our boot straps.[1] But that is not the present proposition in any sense. The aim is to differentiate in the total worth between two distinct sources of value: one, the actual investment in physical plant, to be credited to stockholders; the other, the franchise value due to rights of way, privileges and monopolies of location and operation, which have been conferred by public grant. So long as these franchise gifts were of doubtful value, the people were willing to permit all profit upon them, if there were such, to accrue to the private owners of the shares; but as soon as that stage of development is passed, the public insists upon its right to some part of the advantage. In brief, the demand for valuation registers a protest on behalf of the public against paying interest indiscriminately to private stockholders upon values which the public itself has created and granted to the corporations. It is the emergence of such values over and above the capital investment-values due to the growth of the country—which renders

[1] Compare, in this connection, Dr. Smalley's pertinent criticism of the Nebraska Maximum Freight Rate decision. Publications American Economic Association, 3rd series, vol. vii, no. 2, May, 1906, p. 73, footnote.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

such a demand inevitable at about this time. As against the railroads, it is due to the same cause as the widespread agitation for valuation and taxation of public-service franchises in the large cities.

The two sources of income, or rather distinct elements in income, above named are, it is alleged, as different from one another as interest and profits. That part of the capital of a long-established railroad in a well-settled country which is usually represented by its bonded indebtedness and by that portion of its stock which stands for the actual property, is today as certain of an interest return as investments in government bonds. The element of risk is practically absent. Neither undue conservatism nor inefficiency in management, nothing in fact short of downright fraud, can jeopard this part of the income. Hence, we say, it is akin in its nature to interest. The remaining portion of the income is of another sort. It is like good-will in business. It is a direct reward either for ability in management or for some privilege of location, right of way or monopoly. It may fluctuate from year to year with changes in crops or business conditions. It may vanish entirely during a prolonged period of depression. The element of risk being great, the average return must be high in the same proportion. Under able management it may grow to large proportions, and so far as liberal dividends due to this particular cause are concerned, the public has certainly no right to complain. But over and above this, as the country fills up, dividends are bound to increase more and rapidly. It is probable that their increase will be much more rapid than the mere return on the enlarged investment in physical plant, unhindered as it is, save in degree, even by the fact of incompetent direction. This is the portion of the total income which gives rise to a franchise value, as distinct from the value of its plant, and it is this income which it is the present aim of the project under discussion to evaluate.

The difference between capitalizing all net income, in other words, making earnings the sole criterion of value, and resorting to a distinction between physical property and franchise value, may best be shown by a concrete illustration. Reverting to the earlier example on page 583, it will be recalled that, out of

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

a total income for the hypothetical road of $1,200,000, we allowed $500,000 to stand for five per cent on the $10,000,000 of real property, while the balance of income ($700,000), capitalized at seven per cent, would support a valuation of the franchise at $10,000,000. This would constitute a total of $20,000,000. The railroad man alleges that it makes no difference whether dividends be computed at six per cent on $20,000,000, or be reckoned, as is done here, at five per cent on the first $10,000,000 and seven per cent on the second like amount. That is indeed true, speaking only of the present. But the advocate of restriction trained in the Massachusetts policy goes further. He would never permit more than five per cent on that first $10,000,000, standing for the physical plant. All the balance of earnings, if distributed, must be chargeable as dividends, on the remaining half. This would make the rate of dividend rise more rapidly than if computed equally on the entire capital, as one instance will demonstrate. Suppose the earnings rise from $1,200,000 to $1,800,000. Were all securities paid alike, this would permit nine per cent on the original capital of $20,000,000. But if only five per cent on the first $10,000,000 were allowed, there would be a balance of $13,000,000 of income left over, which would yield 13 per cent on the second $10,000,000 of securities. Public attention to this, as an enhanced franchise value, would be far more likely to be aroused than under the nine-percent plan of equal dividends on all alike.

Of course it will promptly be urged that the two elements of income above distinguished are inseparable in fact; in other words, that, as before said, property *per se* has no value, but that its worth arises solely from the fact of its use or location. This is indeed true of purely private property not enjoying particular rights either of location or of monopoly. A mill property incapable of operation has only the worth of junk less the cost of removal. But a railroad, entirely apart from the value of its physical plant, possesses an element often of high value in its right to be and to do and, with the steady growth of population and wealth of its territory, to continue to be and to do. This, it is urged, is the franchise value, something more even than the value as a going concern. It is an imperishable asset given in

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

trust by the people. As distinct from mere capital investment, represented by the physical plant, it is *opportunity*. Reviewing our argument with even closer scrutiny, we may distinguish three stages or degrees making for profits. There is, first of all, the mere useable property more or less adapted to serve an economic end. Even when dead it has a value—call it a bric-a-brac value if you please—which is deserving of a return to its owners. Quickened by proper use, it earns an added income—the return to a going concern. And then, last of all, this capital, when invested under specially advantageous circumstances, peculiarly those of monopoly and favored location, yields still more fruitfully a return upon opportunity. This last is the source of franchise values, now emerging all over the land and giving rise to difficult and perplexing problems both of regulation and taxation.

Hitherto, so long as pioneer risks were involved, the people have been well content to permit all these various forms of return to remain fused into a single bulk payment to the owners. But the time approaches—if it is not yet here—when such returns are subjected to analysis, to the end that private capital shall receive a generous return, ample in all respects to secure a further provision for the future as it shall be needed, but that beyond that point the "unearned increment" shall accrue, in part at least, to the state, either in the form of better service, lower rates or increased tax contributions to the public treasury. The first step in differentiating these elements of income must be to make a bric-a-brac valuation of the physical plant and thereafter to insure a normal yearly return upon it. Upon the balance of the income the attention of the public may then be focussed, in the attempt to secure a reasonable and fair division between the private owners and the state.

Fear has been expressed by critics of the president's policy, and especially by railroad men of the old school, that this new conception of the obligation of railroads as quasi-public corporations to share their growing receipts, in future, with the state, as a return for the privileges which they enjoy, will jeopard the just returns upon the private capital already invested, and that present innocent holders of railroad securities

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

will suffer loss in consequence. The plan here outlined does not contemplate that in the least. But it proposes to establish means by which the actual return which investors are receiving shall become measurable and a matter of public record. With the actual worth of the property determined and the volume of capitalization fixed in reference thereto, the rate of dividend expresses at once the rate of return to the owners. No hard and fast line can be laid down as marking a proper return to capital. Eight per cent may be no higher in Texas than five per cent in Massachusetts; four per cent in 1905 no more reasonable than six per cent in 1907. The conditions of the money market determine these things. But when once the element of risk has been practically eliminated, as in the case of returns upon primary securities of sound railroads in well settled communities safeguarded by law against overissue of stocks or bonds, some general relativity can be discerned.

The German corporation law[1] contains a suggestion not inapplicable to this problem of fairly dividing growing railroad returns between the private owners and the state. The law —applicable, be it noted, not alone to quasi-public but to all private corporations—so restricts the activities of promoters and managers in matters of this sort that their profits are obtained in the form of higher quotations for such shares as they may receive instead of from an enlarged volume of securities. Modifying this proposition to suit our railroad problem, why may we not insist, not that the returns of investors should be less, but that, whatever they may be, they shall reflect prosperity and good management by a higher rate of dividend upon a limited issue, rather than by a low rate upon an arbitrarily swollen capital? Then would the people, knowing the true rate, cease to exaggerate it, as they undoubtedly do at present, when such matters are enveloped in an air of mystery. The people of the United States are not niggardly in such matters. They know full well that unless this rate of return is adequate the future supply of capital for improvements and extension will not be forthcoming. They do not object to a rate of return

[1] Described in this regard in Ripley, Trusts, Pools and Corporations, pp. 393–413.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

generous in the extreme—even in Massachusetts, as witness the Boston and Albany lease to the New York Central, approved by law at a dividend rate of nearly nine per cent. They are used to it in other lines of business.[1] But they object to the abnormal returns of twenty, fifty or even one hundred per cent, as made by insiders and stock-market manipulators of the Jay Gould and Harriman type. And the lack of certain publicity always invites suspicion that what may in fact have been a reasonable return was perhaps abnormal and unjustifiable. For this reason, if for no other, it is my belief that any plan which will permit the clear differentiation of franchise values from returns upon material investment will be less likely in the long run to lead to hostile blundering and restrictive legislation than the present semi-developed system of regulation in vogue. Not that we need embark at once upon a universal appraisal of all the railroads of the United States: far from it, indeed! But we may not unwisely make provision by law for such an appraisal, road by road, or for territorial divisions of the country, by some competent administrative body, whenever circumstances seem to render it advisable.

WILLIAM Z. RIPLEY.

HARVARD UNIVERSITY.

[1] Compare the recent decision in New York against the eighty-cent gas rate. *Nation*, March 23, 1907.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

THE LEGAL STATUS OF TRADE UNIONS IN THE UNITED KINGDOM, WITH CONCLUSIONS APPLICABLE TO THE UNITED STATES.

NOTWITHSTANDING the attention that has been given to trade unions in the United States, their legal powers and responsibilities are still very imperfectly defined. Acts permitting their incorporation and prescribing their powers as corporate bodies have indeed been passed in several states, but these have had little practical effect since few unions have desired incorporation. For the most part they have remained extra-legal, voluntary associations, relying on the general law of trusts for the protection of their funds and on the confusing and conflicting decisions of the courts for such knowledge as they have of the extent of their powers.

In the United Kingdom the situation is much more satisfactory. By a series of statutes beginning with the Trade Union Act of 1871 and concluding with the Trade Disputes Act of 1906, the legal status of trade unions has been clearly determined. It is the purpose of this article to review the legislation by which this result has been attained and to deduce from it some conclusions applicable to trade unions in the United States.

The Trade Union Act of 1871, as amended by the Trade Union Amendment Act of 1876, removes the uncertainty that previously existed as to the lawfulness of trade unions. It declares that "the purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful, so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise." As to the organization of a trade union, it provides that any seven or more members of a union may, on condition that its purposes are lawful and that its rules conform to regulations laid down in the acts, procure its registration with the Registrar of Friendly Societies. This secures for it certain privileges in connection with the acquisition of property and the protection of its funds. In pursuance of the

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

latter object, the act authorizes the vesting of the funds of a registered trade union in the hands of trustees and defines clearly the punishment to which these are liable for neglect of their trust. Furthermore, it adds the provision that, on complaint of any person on behalf of the union before a court of summary jurisdiction, the court may order any member, officer or trustee who is charged with misappropriating the funds of the union to make restitution on pain of fine and imprisonment. These provisions are the more important because, in cases which arose before these acts were passed, the English courts had refused to entertain suits brought on behalf of trade unions against their defaulting officers, on the ground that the unions were combinations in restraint of trade and therefore without legal standing.[1]

Besides providing for the protection of a union's assets, these acts expressly declare that nothing in them shall be interpreted to "enable any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach" of certain specified agreements. Among these are agreements as to the payment of dues to a trade union, agreements as to the payment of benefits by a trade union and agreements made between one trade union and another. In other words, under these laws no union may sue a member for dues or another union for breach of contract, nor may a member sue a union for benefits promised. Agreements touching these matters, though perfectly lawful, are unenforceable through the courts.

Contemporaneous with these trade-union acts was the Conspiracy and Protection of Property Act of 1875, which, among other things, laid down the important principle that in connection with trade disputes no agreement or combination to do, or to procure to be done, any act shall "be indictable as a conspiracy if such act committed by one person would not be punishable as a crime." The acts in connection with trade disputes which are punishable as crimes are at the same time enumerated more definitely than in any previous statute. Thus section 4 declares

[1] *E. g.*, Hornby *v.* Close, L. R. 2 Q. B. 133, tried in 1867.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

that any employee of a gas or water company who breaks his contract of service, "knowing or having reasonable cause to believe" that the result will be to deprive the city of its regular supply, shall be liable upon conviction to pay a fine not exceeding £20 or to be imprisoned for a term not exceeding three months. This imposes upon the employees of public-service corporations in the United Kingdom a responsibility which, had it been imposed in this country, would have prevented many vexatious strikes. The next section provides the same punishment for the same offence in *any* employment when the result "will be to endanger human life or cause serious bodily injury or to expose valuable property . . . to destruction or serious injury."

Section 7 of the act refers especially to the limits which the law imposes upon the efforts of trade unionists to win over non-unionists in the course of a labor dispute. It provides:

> Every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority,
>
> (1) Uses violence to or intimidates such other person or his wife or children, or injures his property; or,
>
> (2) Persistently follows such other person about from place to place; or,
>
> (3) Hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof; or,
>
> (4) Watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place; or,
>
> (5) Follows such other person with two or more other persons in a disorderly manner in or through any street or road,
>
> shall be liable to the same punishment provided by the earlier sections.

The Conspiracy and Protection of Property Act thus specifies very clearly the actions in connection with trade disputes which are criminal, whether committed by men individually or in combination, and relieves trade unionists from the charge of con-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

spiracy so long as they confine their combined efforts to improve their condition to acts that would not be criminal if committed by individuals. Judicial decisions have determined pretty clearly what is meant by the terms "intimidation," "violence," "watching and besetting" *etc.* used in the act; and the broad construction put upon these phrases by the courts, backed by the respect for law and order characteristic of all classes in the United Kingdom and by an efficient police force, have made strikes and lockouts there conspicuously free from acts of violence and lawlessness. Trade unionists were fairly well satisfied with the situation, as they knew definitely what they might do without rendering themselves liable to punishment; employers were content with it because the unions were on the whole law-abiding.

Cases arose, however, from time to time in which employers felt that their property interests were wantonly sacrificed by their striking employees, and that they were entitled to indemnity. As the trade unions gained in wealth and power, the feeling that the unions as such should be held to some degree of responsibility for the unlawful acts of their officers and members led a railway company to attempt the novel task of enjoining and suing a union. Up to the time when this suit—the famous Taff Vale case—was decided, no trade union in the United Kingdom had ever been held liable for the payment of damages. That trade unions should not be liable for the tortious acts of their officers and agents had been the definite recommendation of the minority report of the Trade Union Commission of 1867, on which the legislation of the seventies was based. That they were not so liable, although this was not expressly stated in the Trade Union Acts, was so generally believed that the report of the Labor Commission of 1891 speaks of the "proposal" that they be made liable as "open to the gravest objections," and goes on to emphasize the advantages of "the present freedom of trade unions from any interference by the courts." It was in the face of such widespread impression as to the legal status of trade unions that the decision in the Taff Vale case affirming that they had all along been liable for damages was rendered.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

The Taff Vale suit arose out of acts of the officers and members of the Amalgamated Society of Railway Servants, committed during the course of a strike against the Taff Vale Railway Company. These acts were among those prohibited by the Conspiracy and Protection of Property Act, and the question was formally raised by the railway company whether the union as such was not legally responsible for the damage that had resulted. The case was first tried before Mr. Justice Farwell, who maintained that trade unions might be sued and gave a verdict to the railway company. On appeal to the Court of Appeals this judgment was overruled and the commonly accepted view that unincorporated trade unions are not legally responsible for their acts was asserted. The case was then carried to the House of Lords and tried before the Lord Chancellor and Lords Macnaghten, Shand, Brampton and Lindley. This highest court decided on July 22, 1901, by unanimous vote, that the Court of Appeals had been in error and that a trade union might be sued for damages like an incorporated company.

The grounds for this decision are tersely indicated in the opinion of the Lord Chancellor in the following words:

> If the Legislature has created a thing which can own property, which can employ servants, which can inflict injury, it must be taken, I think, to have impliedly given the power to make it sueable in a court of law for injuries purposely done by its authority and procurement.

Expressing his views more at length, Lord Brampton said:

> The lawless acts complained of were clearly wrongful acts, which justified the company in seeking to have them restrained by those who caused them to be committed; and inasmuch as the acts were done by men acting as agents of the society, acting in furtherance of a strike sanctioned and conducted by the society through its authorized officers, the society is responsible for them. The other question was whether the society can be sued by its registered name. I see no reason why that question should not also be answered in the affirmative. A legal entity has been founded upon the Trade Union Act by the registration of the society, and the legal entity so created, though not perhaps in the strict sense a corporation, is, nevertheless, a newly-created corpor-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

ate body, and by statute called a Trade Union, consisting of many thousand persons; and the omission from the statute of any provision that this body should be sued or be capable of suing by any other name than its registered name appears to me to lead to no conclusion except that by that name and no other the Legislature intended it should be known and be known for all purposes, including legal proceedings, provided that no other provisions militated against such a construction, as, for instance, in the case of trustees by section 9, who really hold property for and have personal property in the society.

Lord Lindley was even more emphatic. He said:

I have myself no doubt whatever that if the Trade Union could not be sued in this case in its registered name some of its members, *viz.*, its Executive Committee, could be sued on behalf of themselves and other members of the society, and an injunction and judgment for damages could be obtained in a proper case in an action so framed. Further, it is, in my opinion, equally plain that if the trustees in whom the property of the society is legally vested were added as parties an order could be made in the same action for the payment by them out of the funds of the society of all damages and costs for which the plaintiff might obtain judgment against the Trade Union. I entirely repudiate the notion that the effect of the Trade Union Act of 1871 is to legalize Trade Unions and confer on them rights to acquire and hold property and at the same time to protect the union from legal proceedings if their managers or agents acting for the whole body violate the rights of other people. For such violation the property of a Trade Union can unquestionably, in my opinion, be reached by legal proceedings properly framed.

As will be seen from these citations the decision of the House of Lords gives little attention to the grounds on which the Court of Appeals had based its over-ruling of the lower court. The issue is made to turn almost entirely on what may be called the legal logic of the case. No attempt is made to determine, by a study of the debates of the period, what Parliament had really intended in 1871. Still less is any consideration given to the arguments for and against the policy embodied in the decision from the viewpoint of social expediency. Perhaps these limitations were inevitable in a judicial

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

decision, but they served to emphasize the desirability of having such an important point decided by act of parliament rather than by a half-a-dozen judges, no matter how eminent.

Having determined that a trade union might be sued, the law lords remanded the case back to the King's Bench Division of the High Court of Justice, by which damages to the amount of $115,000 were awarded to the railway company on February 23, 1903. As the costs in the suit also assessed against the Union amounted to an additional $135,000, the Taff Vale strike, which had lasted less than two weeks, proved one of the most costly that English unions have undertaken. Even the surplus of this wealthy railway brotherhood, which at the time of the strike was $1,500,000, would soon be depleted if drawn upon at this rate for every strike that might arise. Very naturally the decision called forth a storm of protest from trade unionists and their sympathizers all over the country, and steps were at once taken to have the law as thus determined by judicial decision changed by act of Parliament.

Mr. Richard Bell, the secretary of the aggrieved union, who happened to be at the same time one of the labor members of Parliament, lost no time in bringing in a bill which among other things prohibited actions against trade unions or their representatives based on "any act done in contemplation or furtherance of a trade dispute." The government of the day was not prepared for such a sweeping exemption of trade unions and delayed legislation by securing the appointment, in June, 1903, of a Royal Commission on Trade Disputes and Trade Combinations. This commission consisted of three distinguished jurists, Lord Dunedin, Sir Godfrey Lushington and Arthur Cohen, Esq., one representative employer, Sir William T. Lewis, and the recognized English authority on trade unionism, Sidney Webb, Esq. For reasons which do not appear from its report the commission did not begin taking testimony until March, 1904, and did not finish—although it held but twenty-eight sessions—until April, 1905. Its report[1] was not submitted until January, 1906, or until after the Liberal government had

[1] Report of the Royal Commission on Trade Disputes and Trade Combinations, iv, 132; xii, 350; vii, 93 pp. Two volumes (London, Wyman & Sons, 1906).

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

come into power and the elections were in progress which were to add so signally to the number of Labor representatives in Parliament. Although the recommendations of this conservative commission came too late to have much weight in shaping the legislation of last year, they are of considerable historical interest.

The commission was embarrassed at the outset by the decision of trade unionists throughout the country, reached at the general trade-union congress in September, 1903, to decline to appear before it as witnesses. The representatives of organized labor took the ground that the subject had been exhaustively considered during the seventies and on several occasions since, and that everything that could be said had been said. They maintained that the Taff Vale decision defeated the manifest intention of Parliament and they appealed to the country to return a Parliament which would vindicate its dignity by making its earlier intention effective. Inconsiderate as this action was to the members of the commission, its political expediency appears abundantly justified by the result.

Prevented from examining trade unionists, the commission was forced to content itself with the testimony of fifty representative employers and some fifteen miscellaneous witnesses. Considering the one-sided character of this testimony it is perhaps to the credit of the majority of the commission that Sir William T. Lewis is moved to complain in his minority report that "most of [its] recommendations seem to [him] to be directly contrary to the evidence." The recommendations themselves, nine in number, are designed to clarify the existing law rather than to amend it in any important particular.

On the principal question, that is, whether the Taff Vale decision should be allowed to remain the law of the land, the commission takes conservative ground. After a careful review of the history of the decision and a justification of it from the legal viewpoint, the commission goes on to defend it from the point of view of "justice and equity." "It is affirmed that the objections against disturbing the law as laid down in the Taff Vale case appear . . . insurmountable." For, as the report continues:

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

There is no rule so elementary, so universal, or so indispensable as the rule that a wrong-doer should be made to redress his wrong. . . . That vast and powerful institutions should be permanently licensed to apply the funds they possess to do wrong to others, and by that wrong inflict upon them damage, perhaps to the amount of many thousand pounds, and yet not be liable to make redress out of those funds, would be a state of things opposed to the very idea of law and order and justice.

This part of the report is concurred in by all the members of the commission, but Mr. Sidney Webb qualifies his endorsement of it by appending a memorandum in which he declares his conviction that strikes and lockouts are unworthy of a civilized community and that the only satisfactory method of dealing with trade disputes is through compulsory arbitration.

The positive recommendations of the majority of the commission are that an act be passed to accomplish the following objects:

(1) To declare Trade Unions legal associations.

(2) To declare strikes from whatever motive or for whatever purpose (including sympathetic or secondary strikes), apart from crime or breach of contract, legal, and to make the act of 1875 to extend to sympathetic or secondary strikes.

(3) To declare that to persuade to strike, *i. e.*, to desist from working, *apart from procuring breach of contract*, is not illegal.

(4) To declare that an individual shall not be liable for doing any act not in itself an actionable tort only on the ground that it is an interference with another person's trade, business, or employment.

(5) To provide for the facultative separation of the proper benefit funds of Trade Unions, such separation if effected to carry immunity from these funds being taken in execution.

(6) To provide means whereby the central authorities of a Union may protect themselves against the unauthorized and immediately disavowed acts of branch agents.

(7) To provide that facultative powers be given to Trade Unions, either (a) to become incorporated subject to proper conditions, or (b) to exclude the operation of section 4 of the Trade Union Act of 1875, or of some one or other of its sub-sections, so as to allow Trade Unions to enter into enforceable agreements with other persons and with their own members.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

(8) To alter the 7th section of the Conspiracy and Protection of Property Act, 1875, by repealing sub-section 4 and the proviso[1] and in lieu thereof enacting as a new sub-section (which would also supersede sub-section 1): "Acts in such manner as to cause a reasonable apprehension in the mind of any person that violence will be used to him or his family, or damage be done to his property."

(9) To enact to the effect that an agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute shall not be the ground of a civil action, unless the agreement or combination is indictable as a conspiracy notwithstanding the terms of the Conspiracy and Protection of Property Act, 1875.

Sir Godfrey Lushington, in a minority report that is particularly valuable for its discussion of judicial decisions bearing on trade disputes and trade combinations, concurs in the second, third, fourth and ninth of the above recommendations, but dissents strongly from the others. Sir William T. Lewis, the other minority member and the "stand-patter" of the commission, dissents from all of the recommendations.

In the general election of January and February, 1906, the Taff Vale decision was one of the issues on which the country was called upon to declare itself. The success of the Labor candidates at the polls, coupled with the arguments which they were able to urge in behalf of their position, persuaded the Liberal government to accede to the wishes of the trade unionists and to bring in a bill exempting labor organizations from liability for damages. At the same time the opportunity was used to make the law in regard to trade disputes clearer and also, from the viewpoint of wage-earners, fairer than it had been before.

The Trade Disputes Act, which became a law on December 21, 1906, contains but five sections. The first section adds the following new paragraph to follow after the first paragraph in section 3 of the Conspiracy and Protection of Property Act of 1875:

An act done in pursuance of an agreement or combination by two or

[1] This proviso is omitted from the extract from the act given *supra*, p. 613, because it was repealed by the act of 1906.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable.

In other words the immunity of combinations engaged in trade disputes, so long as they confine themselves to acts which individuals may do with impunity, is made clearly and expressly to include liability to civil actions as well as that to criminal actions expressly conceded by the act of 1875. In the opinion of many able jurists this was already the law,[1] but this clause serves to settle the point beyond dispute. Since this section is substantially recommendation 9 of the Trade Disputes Commission, it may be regarded as approved very generally by instructed public opinion.

Section 2 adds to the qualifications on the prohibition against "watching and besetting" contained in the proviso appended to section 7 of the act of 1875, which it repeals, by declaring:

It shall be lawful for one or more persons acting on their own behalf or on behalf of a trade union or of an individual employer or firm in contemplation or furtherance of a trade dispute, to attend at or near a house or place where a person resides or works or carries on business or happens to be, if they so attend merely for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from working.[2]

Section 3 continues:

An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment, or that it is an inter-

[1] Cf. Memorandum on the Civil Action of Conspiracy, by Mr. Arthur Cohen. Report of the Royal Commission on Trade Disputes and Trade Combinations, 1906, vol. i, pp. 20–23.

[2] This clause is intended to accomplish the same purpose that inspired recommendation 8 of the Trade Disputes Commission. The act of 1875 had expressly permitted watching and besetting for the purpose of transmitting or obtaining information, but the courts had interpreted this so rigidly that pickets were in some cases penalized for attempts peacefully to persuade strike-breakers to give up their employment. Such "peacefully persuading" in connection with picketing is now lawful, it being left to the courts to decide where persuasion ends and intimidation begins.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

ference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or of his labor as he wills.

Section 4 adds the all-important provision:

An action against a trade union, whether of workmen or masters, or against any members or officials thereof on behalf of themselves and other members of the trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any court.

This clause presents the British Parliament's reply to the "unanswerable logic"[1] of the law lords in the Taff Vale decision. It amounts to declaring that, however clear it may be to the legal mind that trade unions should be liable to suits like any other legalized entities, higher reasons of public policy make this undesirable, and in future the courts shall not entertain such suits whether instituted against organizations of workmen or organizations of employers.

Finally, section 5 gives the official designation of the act and defines the terms "trade union," "trade dispute," and "workmen," so as to make it clear that it is immaterial from the point of view of the law whether the dispute concerns workmen and their own immediate employers or is one between other workmen and other employers or among workmen themselves. In other words the immunities of the act apply as well to secondary or sympathetic as to primary strikes, as well to strikes to prevent the employment of non-unionists as to those to benefit the strikers in more direct and obvious ways.

A comparison of these last three sections with recommendations 2 to 6 inclusive of the Trade Disputes Commission shows that they liberalize the law in regard to trade disputes and trade combinations at every point where the commission recommends that it be made more liberal, and that at times they accomplish this result by going considerably further than the commission deemed wise. This overstepping of the recommendations of the commission is particularly marked in section 3, which is to

[1] *Cf.* Adams and Sumner, Labor Problems, p. 275.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

be compared with recommendations 3 and 4, and section 4, which is to be compared with recommendations 5 and 6. The only concessions proposed by the commission which were not embodied in the Trade Disputes Act are thus those of recommendations 1 and 7. No clause was introduced declaring in so many words that trade unions are lawful associations, because this was believed to be accomplished completely by the legislation of the seventies. The absence of any provision permitting trade unions to enter into legally binding contracts is doubtless to be explained by the fact that, on the part of trade unionists themselves, there was no demand for such a clause. Friends of trade unionism like Mr. Sidney Webb, whose influence no doubt helped to secure the adoption of this recommendation by the commission of which he was a member, have long advocated a change in the trade-union law on this point as a means of insuring the more careful observance by both employers and employees of the collective bargains that may be entered into, but those directly responsible for the direction of trade-union policy prefer that fidelity to labor contracts should continue to depend upon the sense of honor of the contracting parties rather than on a property obligation.

By way of summing up this long review of the steps by which British trade unions have acquired the legal status which they now enjoy, that status may be briefly defined as follows:

(1) They are organizations whose existence is expressly legalized and which are provided with adequate legal means for protecting their funds.

(2) At the same time they may not sue their members for their dues, nor may the members sue them for promised benefits.

(3) Their members are liable neither to prosecution for conspiracy nor to suits for damages, so long as their combined acts are such as would be neither criminal nor civilly actionable if performed by individuals.

(4) Workmen and employers are given the widest freedom to strike or lockout or to persuade others to strike or lockout for whatever reasons they deem wise, so long as they do not commit criminal acts or violate their own contracts.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

(5) What are criminal acts in connection with trade disputes is clearly defined in the statutes.

(6) Finally, suits against them for alleged tortious acts performed on their behalf by their officers or agents are not to be entertained by the courts.

The aspect of this status which seems most open to question is that covered by the last provision. To the legal mind there is, as the Trade Disputes Commission affirms, something anomalous about associations whose existence is guaranteed by the law and yet which are relieved by the law from responsibility for the acts injurious to others that may be performed on their behalf. Moreover the sort of responsibility which the lawyer at once thinks of in connection with corporations and similar associations is financial responsibility. Responsibility to the state which creates them or to public opinion which approves or condemns their acts does not seem sufficient. The legal way to recompense injury to property is through the assessment of damages, and if the injury is caused by a legally constituted trade union, it seems to the legal mind obvious that the trade union should be held to damages.

But the question is too important to be decided by reference merely to legal precedents and traditions. There is good ground for the widespread feeling among wage-earners that the rights of property are made too prominent in our legal system, and that at too many points persons with property enjoy advantages over those without. We must recognize that the small accumulations of wage-earners are vastly more important to them and to society, dollar for dollar, than the much greater resources of capitalist employers. Just as our common system of making light punishments either fine *or* imprisonment falls with far greater severity on the poor who cannot pay fines than on the well-to-do who can, so a plan of penalizing trade unions by making their funds liable in the same way that is recognized as just and proper in the case of business corporations may be both unjust and inexpedient. We must consider carefully the effect such a policy will have upon the labor movement before deciding in favor of it; and we must recognize that the protection of the property interests of employers, while an important,

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

is by no means the most important end to be kept in view. The most important end is the protection of the personal rights of both sides and the maintenance of conditions which will advance the general welfare of the community. Looking at the question in this broader way, there are four arguments that I would urge against the wisdom of holding trade unions to financial responsibility as was proposed in the Taff Vale decision.

In the first place there can be no doubt that exposing the funds of trade unions to attack in the interest of hostile employers would retard greatly the progress of the movement towards organization and make the prosecution even of the most justifiable strikes extremely difficult. Workingmen have little experience with litigation and are abnormally timid about becoming involved in it. They rarely distinguish clearly in their minds between civil and criminal suits, and the mere service of a suit for damages would throw most trade unions into a panic. Such action would be particularly effective during the progress of a strike, when the officers of the union must strain every nerve to hold the members to their allegiance, and when a favorable attitude on the part of the public is most important to success. At such a time the institution of a suit for heavy damages against the union would have a most discouraging effect, whether or not there was substantial ground for the suit. The mere fact that it was begun would alienate those members who were already wavering and would prejudice the public in favor of the employer. Moreover, it would force the union officers to turn their attention from the prosecution of the strike to a defense of the measures they had taken in the interest of the union and to employ expensive legal counsel. These results, it may be urged, are those to which all are liable who are guilty of unlawful acts; but the point is that they fall with special hardship upon trade unions if, in addition to the individual responsibility to which, of course, all the officers and members are at all times liable, there is added the kind of corporate responsibility proposed by the Taff Vale decision.

In the second place it should be recognized that trade unions are as a rule somewhat loosely organized, and that a mistaken devotion to the union cause constantly leads individual officers

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

and members to do things in the name of and in the interest of the union which the majority of the members would not approve. Under these circumstances it seems unfair as well as inexpedient to make the union collectively responsible for the acts of its members. And this is particularly the case when the reserve funds against which damages may be assessed have been collected in connection with insurance benefits provided by the union. The insurance reserve at least, it would seem, should not be attachable for damages, but it is rare for a trade union to keep any separate account of its insurance funds, and there are, as all students of the labor movement concede, good reasons why it should not do so.

In the third place, financial responsibility is not the only kind of responsibility by which a trade union may be held up to a strict observance of the law in its conduct of trade disputes. There was no considerable amount of lawlessness in connection with strikes in the United Kingdom before the Taff Vale decision. An efficient police force, a public opinion hostile to every form of lawlessness and a trade-union organization which brings able, intelligent and cautious labor leaders to the fore—these are the conditions which make for fair play and observance of the rules of the game, much more than any liability for monetary damages in case authorized lawlessness can be proved. If to these are added a certain degree of administrative control over the rules and policies of trade unions and a tendency on the part of the courts to discriminate between law-abiding, well-intentioned unions and those which are lawless and monopoly-seeking, I believe that the conditions will be more favorable for strict observance of the law on the part of trade unions than if they are the objects of suits for damages whenever the attorneys of employing corporations think that the psychological moment for such proceedings has come.

To these three positive arguments against the principle of the Taff Vale decision one important negative one should be added. The effect of trade-union responsibility for the authorized acts of officers and members must be to render their proceedings secret and underhanded. The attempt would inevitably be made, whenever a suit arose, not only to establish the innocence

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

of the officers and members accused but to show that they acted without authority. This result would be unfortunate from every point of view. Nothing is so necessary to the peaceful solution of the labor problem as fair, frank and free discussion. Employers and employees should be encouraged in every way to make their grievances public and to submit their cases to the bar of public opinion. A policy which causes trade unions to become more secret in their methods and procedure fosters dishonesty, suspicion and bitterness, and encourages lawlessness far more violent and dangerous in its tendencies than any which mere financial responsibility could be expected to check.

On these and other grounds the representatives of the organized wage-earners of the United Kingdom appealed to the judgment of parliament to reverse the Taff Vale decision and to restore the law to what it was very generally believed to be before that decision was rendered. In yielding to this demand the Liberal government of the day has no doubt been influenced by the growing political importance of the Labor party. It has nevertheless in my opinion acted wisely, especially if it proceeds now to develop what seems to be the logical corollary of its policy, that is, effective administrative control over trade unions to protect employers and the public from the losses to which they must otherwise be exposed through ill-advised and unlawfully conducted strikes.

In concluding this article I cannot refrain from adding a few suggestions in regard to the sort of administrative control to which, as it seems to me, trade unions ought to be subjected for their own sake as well as for that of employers and of the public. As a basis for discussing the legal status that should be assigned to trade unions I think we may fairly premise that it is now generally conceded by economists that such organizations are on the whole socially advantageous. Since they are so, they should be fostered and encouraged by the state rather than thwarted and discouraged. This view should not, however, blind the legislator to the fact that they have great potentialities for evil as well as for good. To check their bad while fostering their good tendencies should be the end of public

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

policy. For this purpose there should be instituted a system of administrative control. This could be operated by requiring trade unions to take out licenses from the state government, or to register as in the United Kingdom, as a condition to enjoying the protection of the courts in connection with the financial side of their activity. To secure licenses they could then be compelled to make their rules and policies conform to certain standard requirements and could be made subject to a certain amount of supervision and inspection as a means of determining whether they were complying with the license law. For non-compliance they could be punished by forfeiture of the license with the withdrawal of all privileges which this would entail.

The regulations to which licensed unions should be subject should include the following:

(1) Provisions making admission to the union freely open to all respectable and competent workmen in the trade on the payment of reasonable admission dues.

(2) Provisions barring from participation in the benefits of the organizations persons convicted of violence or other forms of lawlessness in connection with trade disputes.

(3) Provisions insuring the honest and faithful administration of trade-union funds and requiring periodic reports of income and expenditures as a means of controlling such administration.

(4) Provisions requiring the submission of the rules of the union to the official charged with their supervision and penalizing departure from these published rules in the actual conduct of the union's policy.

Some progress in the direction of such a regulative policy was made in the United Kingdom in the Trade Union Act of 1871. As already stated, that act limits the privilege of registry to unions whose purposes are lawful and which comply with certain requirements in the registry law. Among the requirements are: (1) the rules of the union must be filed with the registrar and any changes in these rules must be reported annually; (2) annual financial statements in accordance with a prescribed form must be made to the registrar; (3) the rules

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

must contain certain provisions insuring responsible administration of the union's business and publicity in regard to its accounts. These are all in the right direction and could easily be supplemented by the other regulations advocated.

Up to the present time the only steps that have been taken in the United States in the direction of a regulative policy are, so far as I am aware, the recognition by the courts that membership in trade unions is a species of property, of which no one can be deprived except through a formal procedure in conformity with the rules of the organization, and the enactment by the legislatures of some of the states (*e. g.*, New York in 1903) of statutes prohibiting trade unions from making any discrimination in connection with their admission requirements on account of membership in the state militia or national guard. It is only necessary to follow up these regulations in the way that has been advocated to establish a system of administrative control as effective as a means of checking lawlessness as the property responsibility established by the Taff Vale decision. This would have the great merit of marking off the law-abiding from the lawless type of union and of purifying the organization movement from the abuses which now cause public opinion to be somewhat halting and uncertain in the approval and encouragement which it accords to the aims of organized labor.

HENRY R. SEAGER.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

CONSTITUTIONALITY OF CIVIL SERVICE LEGISLATION

THE history of the efforts to substitute in American civil service the merit system for the "spoils system" records an incessant surmounting of constitutional objections. Scarcely a statute has been passed in any of our jurisdictions, which has looked toward the betterment of the service, that has not been assailed as to all of its material points upon the ground that it contradicted the fundamental law. Although the tendency of the courts has undoubtedly been to sustain the right of the legislatures to act in this sphere, some provisions have been declared wholly unconstitutional; in some states it has been necessary, in order to secure adequate laws, to incorporate in the constitutions amendments recognizing the merit system; and it is an open question to-day whether some objects sought can be obtained without further constitutional amendment. Speaking generally, it may be said to be uniformly admitted that laws providing for the ascertainment of the fitness of a candidate for a governmental position are constitutional. It is also generally conceded that the legislature may provide an educational qualification, may insist on good morals and temperate habits, and may give a preference among the candidates to those who have served their country in time of war. It was, indeed, judicially affirmed in New York,[1] in 1824, that "the legislature cannot establish arbitrary exclusions from office or any general regulation requiring qualifications which the constitution has not required"; but in that case it was held that a statute excluding duellists from office was proper, and in subsequent cases provisions looking to the betterment of the service, and not imposing qualifications to which all cannot attain, have not in general been regarded as "arbitrary exclusions." Historically viewed, as is pointed out in Peck *v.* City of Rochester,[2] civil-service regulations have been with us so long

[1] Barker *v.* People, 3 Cowen, 686.

[2] 3 N. Y. Sup. 872 (1888).

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

that it seems certain they were contemplated by the various constitutional conventions. For more than five hundred years, says the court, the sheriffs of London have had to count the six horseshoes and sixty-one nails and to cut the bundle of sticks as a proof of their fitness.

But it is not, of course, upon general constitutional theories but upon particular clauses in our forty-five state constitutions and in the constitution of the United States that objections have been based. The subjects of discussion, which logically have very little connection, must be considered separately with more or less special reference to the particular conflicts. Objections have been raised as regards the constitution of civil-service commissions, as regards the prescription of qualifications for office and as regards prescriptions for removal from office.

Constitution of the commission. Non-partisanship.

In the effort to stamp out the "spoils system," it has been found desirable to provide that, of three commissioners appointed to execute the law, not more than two should belong to one political party. Such was the law in New York in 1890, when one Diebold was appointed health inspector of the city of Buffalo. An action was brought to restrain the council from paying his salary on the ground that he was not appointed in accordance with the civil-service law. In reply it was asserted that the law was unconstitutional, because under article one, section one of the constitution eligibility to office was a "privilege" of all citizens and this equal privilege was impaired by not allowing the appointing officer to select a candidate from a particular party after two had already been chosen from such party. The court did not accept this reasoning. Assuming for the sake of argument that such a general right of eligibility to office existed, it said:

> Having been a member of the eligible class from which the other two persons were selected, and having thus had the constitutional chance of appointment equally with all others of that class, all being eligible, we cannot think that while two others from his class have been taken and consequently he has been omitted in the two appointments, his eligibility for holding office extends by virtue of this section of the constitu-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

tion to the right of appointment as the third member of said commission in spite of the condition limiting the appointment to two from any one political party.[1]

As this decision stands alone upon the subject it cannot yet be regarded as conclusive of what the law is.

Qualifications for office. Tests.

The simplest and earliest method of assailing the imposition of qualifications by the legislature was by contending that they were in conflict with the various constitutional clauses which prohibit "tests." The courts, however, do not seem to have found this objection serious. Basing their argument upon historical grounds, they conclude that the word "tests" covers only the practices required by the English Test Act (1673)—such as the public taking of the sacrament, the declaration against transubstantiation or the avowment that the candidate assents to everything in the Book of Common Prayer[2]—and does not extend to qualifications of fitness. This may seem a very strict construction to those who use the word "test" as synonymous with "examination," but it is undoubtedly well-founded in fact and it is unanimously followed. It has been held that a preference to veterans does not constitute a "test"[3]; and a similar decision has been rendered as regards the requirement that the appointee must be a freeholder.[4]

Qualifications for office. Separation of powers.

Montesquieu's principle of the "separation of powers" is applied in all American constitutions and finds actual expression in not a few. It has been the contention of opponents of the "merit system" that the legislature can in no case, without express constitutional authorization, prescribe qualifications for office, as this is a usurpation of an executive function. To this

[1] Rogers *v.* Common Council of Buffalo, 123 N. Y. 173.

[2] Peck *v.* City of Rochester, 3 N. Y. Sup. 872 (1888).

[3] *In re* Wortman, 2 N. Y. Sup. 324.

[4] State *ex rel.* Thompson *v.* McAllister, 38 W. Va. 485.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

there is a ready answer. The regulation of the power of appointment is not a usurpation of an executive function, because the power of appointment itself is not peculiarly an executive function. The legislature has been repeatedly permitted to vest the power of filling a position in itself or in the judicial department. It has been decided that, in spite of a constitutional provision, declaring that "no person charged with the exercise of the powers properly belonging to one of these departments [executive, legislative, judicial] shall exercise any functions appertaining to either of the others, except as in this constitution expressly directed or permitted," the legislature of California, in joint session, might appoint a library trustee.[1] The power to appoint municipal officers, it was held in Illinois, might be conferred by the legislature upon a judge of the circuit court, although a similar constitutional provision obtained in that state.[2] In Alabama, too, under the same conditions, it was decided in the case of Fox *v.* McDonald[3] that the mayor of Birmingham should be compelled by *mandamus* to swear in as chief of police the relator, who was appointed by a board in turn appointed by a probate judge. It is easier, however, to determine what the law is than what its logical basis is. The suggestion made in the last case cited, that the power of selection for office rests ultimately in the people and not in any department, hardly seems helpful; for all exercise of governmental power rests ultimately upon the consent of the sovereign people, and it is difficult to find in this principle a rule which would give the legislature the right of ousting the executive department from any power which this latter department possesses, since, in constitutional theory, the executive is no less representative of the people's sovereignty than the legislature. The true explanation, hinted at in all the cases, seems to be this: that while, abstractly considered, the power of appointment is properly an executive function, yet in the commingling of powers in American constitutional history it has come to be detached from that department.

[1] People *v.* Freeman, 80 Cal. 233.

[2] People *v.* Morgan, 90 Ill. 558.

[3] 101 Ala. 51.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Qualifications for office. Constitutional power of appointment.

But what of the situation when the power of appointment is expressly vested by the constitution elsewhere than in the legislature? Here it is obvious that for the legislature to step in and demand qualifications, such as competency as determined by a civil-service examination, is to delimit if not entirely to usurp this power. As to the constitutionality of such legislative action, the authorities are sparse. They consist, first, of an utterance of United States Attorney-General Akerman, and second, of a few judicial determinations in New York, prior to the constitutional amendment of 1894, which committed the state to the merit system.

In approaching this question, it seems clear that where the constitution provides that a certain officer is to be appointed by a certain authority, no civil-service commission created by the legislature can by its restriction practically fill the office—not if the word "appoint" involves any idea of choice upon the part of the authority. Says Attorney-General Akerman:

> If the President in appointing a marshall, if the Senate in appointing its secretary, if a court or head of a department in appointing a clerk, must take the individual whom a civil-service board adjudge to have proved himself the fittest by the test of a competitive examination, the will and judgment which determine that appointment are the will and judgment of the civil-service board, and that is virtually the appointing power. . . The most important civil appointments are made by the President with the advice and consent of the Senate. If Congress can compel the President to nominate a person selected by others, it can compel the Senate to advise and consent to that nomination. But advice and consent imply an exercise of judgment and will. So does nomination. So does appointment. There is this difference, that the judgment and will of the Senate can regard only the person proposed by the President, while there is no similar constitutional restriction upon his judgment and will. But there is no right in Congress to constrain either to adopt the judgment and will of others.[1]

Congress, the opinion admits, has previously authorized appointments independent of the constitutional depositories of

[1] 13 Opinions, 516.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

power; but this has been done only where, the appointing officer being responsible for the conduct of his appointees, the head of the department was the real appointing power,[1] or where the so-called offices were mere employments.

The attorney-general, however, does not carry out his views to the extreme. He is inclined to believe that qualifications of fitness may be imposed, provided a sufficient sphere for the exercise of his choice is left the appointing officer.

> Congress could require that officers shall be of American citizenship or of a certain age, that judges shall be of the legal profession or of a certain standing in the profession, and still leave room to the appointing power for the exercise of its own judgment and will; and I am not prepared to affirm that to go further and require that the selection should be made from persons found by an examining board to be qualified in such particulars as scholarship *etc.* would insure an unconstitutional limitation.

This very plausible suggestion did not, however, appeal to the New York judges who were called upon to decide this question. In 1874 the Court of Appeals had held that an assessment levied by commissioners appointed by a court of record, a method prescribed in the constitution, was void because the court had been compelled by a statute, which the Court of Appeals declared unconstitutional, to choose the commissioners by lot.[2]

When the civil-service cases came up under the law of 1883 they were considered from the same point of view. The case of People *v.* Durston[3] was decided in 1888. Section four of article five of the New York constitution grants the superintendent of prisons the power to appoint wardens who, in turn, are to appoint their subordinates. The relator, one Travis, asked for a *mandamus* to compel a warden to reinstate him, on the ground that he was a veteran and hence improperly dismissed under the civil-service law. The Court of Appeals held squarely that the law was not mandatory upon the warden, because his power of appointment was constitutional and could

[1] United States *v.* Hartwell, 6 Wall. 393.

[2] Menges *v.* City of Albany, 56 N. Y. 374. [3] 3 N. Y. Sup. 522.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

not be limited by statute. In the same year the famous case of People *v.* Angle[1] declared the civil-service law invalid, so far as it restricted constitutional powers of appointment. The relator, one Killeen, applied for a *mandamus* to compel the commission to examine him for the position of collector of canal statistics. By article five, section three of the constitution the superintendent of public works is empowered to appoint his own subordinates. The court refused the *mandamus*.

Of course these decisions have now no practical bearing on New York law, since the amendment of 1894 declared that "appointments and promotions in the civil service of the state . . . shall be made according to merit and fitness, to be ascertained . . . by examinations which, so far as practicable, shall be competitive . . ." and provided for a preference to veterans. In the case of People *v.* Roberts[2] it was held that this amendment rendered the law of 1883 operative as to powers of appointment vested in executive officers by the constitution, in which respect alone it had been held by the cases cited above to be unconstitutional. Yet in a jurisdiction where the merit system has not been authorized by constitutional provision the case of People *v.* Angle and others above cited would have great weight. It is doubtful whether civil-service legislation would be allowed to limit a constitutionally vested power of appointment, however large a room for choice was left to the appointing officer.

Qualifications for office. The highest on the list.

It is a further matter of doubt whether an appointing officer whose power of appointment has the slightest constitutional sanction can be constrained to select the highest candidate on the eligible list. There is a New York case, subsequent to the amendment of 1894, which is here directly in point.[3] In this case application was made for a *mandamus* to compel the board of street commissioners of Binghampton to appoint the relator superintendent of streets. The eligible list contained, first, a

[1] 109 N. Y. 464.

[2] 148 N. Y. 360.

[3] People *v.* Mosher, 163 N. Y. 32 (1900).

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

non-veteran; second, the relator, a veteran; third, another veteran. The civil service act of 1899 required the appointing officer to select the highest on the list, except where there were veterans among those eligible, in which case the highest veteran was to be selected. The court declared the act unconstitutional. It said:

> If the civil-service commissioners have power to certify to the appointing officers only one applicant of several who are eligible and whom they have, by their own methods, ascertained to be fitted for a particular position, and their decision is final, or if, where more are certified, the one graded highest must be appointed, then the civil-service commission becomes and is the actual appointing power. To reach such a result, however, it must be held that the word "appointment" as used in the constitution is not to be given its usual and ordinary meaning, but may be so limited and restricted as to leave in the local authorities a mere ministerial duty with no discretion nor choice nor responsibility in respect to the person to be appointed.

The court, however, approved of the act of 1883 requiring the appointing officer to select from three names submitted by the commission, considering this a reasonable limitation.

Qualifications for office. Preference to veterans.

As was said above, it is generally conceded that a preference to veterans is not illegal. As their distinction is that of achievement and not of birth, the statute that gives them preference is not the kind of class legislation that contravenes the spirit of our constitutional law. There are limits, however, to the preference which may be accorded. The better rule is that a preference can be given to a veteran only after his name is on the eligible list.[1] In Massachusetts, in an "Opinion of the Justices to the Governor and Council,"[2] it was held that veterans cannot be preferred for office unless they at least make application to the commission. The stand taken in Massachusetts on this point was still further strengthened in 1896 by the decision in the case of Brown *v.* Russell.[3] The plaintiff in this case had

[1] *In re* Keymer, 148 N. Y. 219 (1896).

[2] 13 N. E. 15.

[3] 166 Mass. 14.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

passed the best examination but had been replaced at the head of the list by a veteran named Bean, who had not even taken the examination. The statute provided that veterans should be preferred above all other applicants without examination, provided they secured certificates from three citizens of good repute as to their fitness to perform the duties of the office. The court ordered Bean's name stricken from the list, holding that while the legislature could, in making qualifications, take cognizance of the fact that a man who served his country well would do credit to the public service, it could not confine the appointment to veterans as a class without violating the spirit of the bill of rights of the Massachusetts constitution.

Qualifications for office. Effect of constitutional qualifications.

There has been considerable controversy as to the bearing upon civil-service legislation of constitutional provisions which prescribe qualifications for holding office. Do these provisions mean that the qualifications specified are the only ones which may be exacted? Or do they permit the legislature to supplement them with other requirements?

Many states have the provision that no one can be an officer who is not an elector. The opponents of the merit system hold that this means that everyone who is an elector is qualified for office, no matter how unfitted for the position he may be.

The question is a debatable one. Upon the one hand there is the rule of interpretation that everything is to be taken in favor of the constitutionality of legislative action, and upon the other the equally well settled rule, "*expressio unius est exclusio alterius*." The result of adjudication, however, has been a unanimous verdict for the proposition that such provisions do not handicap the legislature.

Article fifteen, section four of the constitution of the state of Ohio provides: "No person shall be elected or appointed to any office in this state unless he possesses the qualifications of an elector." In 1876, *quo warranto* proceedings were brought against the police board of Cincinnati upon the ground that they had assumed office under an unconstitutional act. The act was alleged to be unconstitutional because it required the

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

candidates to be able to read and write the English language, while, as was claimed, qualifications were impliedly forbidden under the section quoted. The court said, per McIlvaine J.: "Unless the clear implication is that every person who has the qualifications of an elector shall be eligible to any office in the state, there is no conflict between the statute and the constitution. I do not believe that such implication arises."[1]

In 1885 the question came up in Colorado, under a similar constitutional clause, in the case of Darrow *v.* People *ex rel.* Norris.[2] In this case the action was *quo warranto* against an alderman of Denver, who had taken office without meeting the legislative requirement of having paid taxes in Denver the previous year. He claimed that the legislature had no right to make this a qualification, but the court held squarely against him on this point, though sustaining his demurrer on another ground.

There was a complete adjudication of the question in West Virginia in a case decided in 1893.[3] The council of the town of Hurricane, in canvassing election returns, declared that certain candidates for the council were not elected because they were not freeholders of the town, as required by statute. *Mandamus* was brought upon the ground that the election was valid, since the statutory bar was inconsistent with article four, section four of the constitution, which reads: "No person except a citizen entitled to vote shall be elected or appointed to any office, state, county or municipal." Judge Dent, in delivering the decision, was very emphatic:

> Such reasoning is very fallacious. . . . We do not believe that the framers of the constitution, by this provision, intended to say that the right to vote should be the sole and exclusive test of eligibility to all offices, except as otherwise provided in the instrument itself. . . . If, as has well been said, they had intended to take away from the legislature the power to name disqualifications for office, other than the one named in the constitution, it would not have been left to the very doubtful implication which is claimed for the provision under consideration.

[1] Attorney-General *v.* Covington *et al.*, 29 Ohio St. 102.

[2] 8 Col. 420.

[3] State *ex rel.* Thompson *v.* McAllister, 38 W. Va. 485.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

The supreme court of California dealt with the question only year before last (1905). The plaintiff, an elector, sought to have the defendant removed from the position of tax collector in San Francisco upon the ground that under the city charter he was not eligible as to residence. The defence was that the charter, so far as it imposed qualifications for office, was unconstitutional, because "when the constitution prescribes qualifications for officers named therein, it creates an implication that no other qualifications shall be required in the case of any office." The court held per Harrison, C.:

> It may be admitted that the legislature can neither increase nor diminish the qualifications which the constitution has prescribed for eligibility to any of the offices created by that instrument; but for all offices which the legislature may authorize or establish, either by virtue of an express authority therefor in the constitution itself, or by virtue of its general legislative authority, it may prescribe such qualifications as in its judgment will accord with public policy or subserve the interests of those affected thereby.[1]

It will be observed that the decision in this last case is narrower than in the others. It would indeed be a far-fetched inference to say that the imposition of certain qualifications upon enumerated officers means that no other officers in the state may be required to possess further qualifications.

In the other cases noticed, however, where the constitutional provision applies to all officers in the state, the case is much stronger for the application of the maxim "*expressio unius est exclusio alterius*"; and it may plausibly be argued that where the constitution has spoken specifically as to the subject of official qualifications, that should end the legislation on the matter, and that the determination of fitness should be left entirely to the appointing power or to the electorate. The courts seem to be of the opinion, however, that the imposition of official qualifications is a normal legislative function—a sphere in which the legislature usually acts. Once this idea is accepted, it is easy to regard such legislative action as contemplated by the constitution-makers, and to say that an implication which

[1] Sheehan *v.* Scott, 145 Cal. 687.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

would deprive the legislature of this power must be a very strong one. In this manner, I believe, it has come to be generally recognized that, where the constitution requires qualifications for office, these qualifications may be supplemented by legislative action, and that such constitutional provisions oppose no obstacle to the establishment of the merit system.

Removal from office. Taking property without due process.

The effort to secure an efficient civil service has been bent, also, in the direction of securing to the various commissions the right to try charges against officers and suspend or remove them if found guilty. The constitutionality of such a legislative provision has been questioned, and Illinois furnishes the law on the subject. Whether the power of removal is a constitutional one or is incidental to a constitutional power of appointment is a point that has not been raised. In Donahue *v.* County of Will,[1] the legislature was held to be competent to authorize the county board to remove the county treasurer, though that official was appointed by the governor. The statute was attacked upon the ground that the officer had property in the office and that to deprive him of his office in this manner was to deprive him of his property without due process of law. This theory, although by no means without support in the English common law, was promptly negatived by the court:

> It is impossible to conceive how, under our form of government, a person can own or have a title to a governmental office. Offices are created for the administration of public affairs. When a person is inducted into an office, he thereby becomes empowered to exercise its powers and perform its duties not for his, but for the public benefit. It would be a misnomer and a perversion of terms to say that an incumbent owned an office or had any title to it.

This decision is quoted approvingly in People *v.* Kipley,[2] and is there applied to the civil-service commission. In this case almost the entire law as passed was attacked, by way of defence against *mandamus* proceedings designed to substitute

[1] 100 Ill. 94 (1881). [2] 171 Ill. 44.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

police officials from the eligible list for some, not on the list, who had been appointed. As regards the question of removal, the court held that the commission had the right to try charges against and dismiss, if found guilty, any of those appointed under the law.

It may safely be concluded, I believe, that a civil-service commission in dismissing an officer for misconduct is not depriving him of his property. If there is any question of constitutionality here, it must be, as has been indicated above, how far the power of removal vested in the commission is assigned by the constitution to some other authority, or is incidental to a power of appointment vested by the constitution in some other authority.

Removal from office. Powers of commission at hearing.

To secure full inquiry into any charges that may be preferred against officers in the civil service, it has seemed expedient to the champions of the merit system to invest the various commissions with as much of the garb of the judiciary as possible. Here again, of course, care must be taken that the doctrine of the separation of powers is not violated. Of course the important thing is for the commission to be able to command the attendance of witnesses and to compel testimony to be given. In the case of People *v.* Kipley,[1] it was held not unconstitutional to confer upon the commission the power to issue subpœnas and take evidence in order to help it reach its determination. The decision in this case also placed the sanction of the court upon a method provided in the statute whereby the commission might make application to any of the regular courts for the compulsion of testimony and for the punishment for contempt of those refusing to testify. The court cited the case of Interstate Commerce Commission *v.* Brimson[2] as sustaining its position. There a similar method provided by statute for the commerce commission was approved.

This roundabout means is the only one practicable if we accept the doctrine enunciated in Langenburg *v.* Decker, that

[1] 171 Ill. 44.

[2] 154 U. S. 447 (1893).

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

the legislature could not empower a board of tax commissioners to punish for contempt. In that case Judge Elliott, in a decision which released on *habeas corpus* a bank official who refused to testify as to the bank's accounts, said:

> The board may be made a complainant by law, in a proceeding to punish a citizen who refuses obedience to its rightful authority . . . but a court or tribunal of judges it can never be so long as our constitution remains unchanged, or so long as the principle of free government forbidding the centralization of the powers of government is respected and obeyed.[1]

The power to compel testimony by punishment for contempt is considered so essentially a judicial function that to confer it upon an administrative board is a constitutional encroachment.

Removal from office. Power to make ineligible.

As a rule, the sentence of a commission upon the determination of the guilt of an officer can be at most that of removal from office. A very desirable provision, however, was introduced in the Illinois act, which permitted the commission upon the dismissal of an officer for misconduct to disqualify him for office for the next five years. By this scheme, offenders would not merely receive a slight setback in their careers of official neglect or peculation but would be removed from the civil service, legally for a term of years, practically, in many cases, forever. In the case of People *v.* Kipley,[2] however, it was held that this provision is unconstitutional in Illinois as violating article two, section eight of the constitution, which reads: "No person shall be held to answer for a criminal offence, unless on indictment of the grand jury, except . . . where the punishment is by fine or imprisonment other than in the penitentiary . . . " Disqualification from office, says the court, being an infamous punishment and not coming within the excepted class, may not be inflicted without indictment by the grand jury. The decision seems open to criticism. In the first place, the disqualification, no less than

[1] 31 N. E. 190 (Ind. 1892). [2] 171 Ill. 44.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

the removal, looks to the benefit of the service rather than the punishment of the individual. In the second place, the court elsewhere cited approvingly the New York case of Rogers *v.* Common Council, which, it will be remembered, spoke very skeptically of the existence of any well defined right of eligibility to office. At all events, there seems to be no reason why the provision for disqualification should not be introduced in states where the rule that punishment shall be inflicted only upon presentment by a grand jury is not in the constitution.

Summary.

This brief review of the situation tends to show, upon the whole, that the path of the civil service reformer is clearer than a recapitulation of the different grounds upon which objections have been raised would lead one to assume. Non-partisanship of the commission; tests; infringement of the doctrine of the separation of powers, either as to the executive or the judicial department; deprivation of property without due process of law; the imposition of qualifications where constitutional qualifications already exist—all these considerations create difficulties, if at all, only in finding the proper manner of introducing the merit system and the proper form of a civil-service law: they do not ultimately prevent the skilled draughtsman from securing the effects he desires. The merit system is not discountenanced by American constitutional law. It is only where the effect of civil-service regulations is so to delimit the power of appointment or removal as to appropriate to a civil-service board the function of the constitutional depositary of that power, that the national and state constitutions very properly stand in the way.

HAROLD HARPER.

NEW YORK CITY.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

THE OFFICE OF MAYOR IN FRANCE

THE most striking single feature of American municipal development during the past two or three decades has undoubtedly been the strong tendency toward an increase in the powers of the mayor at the expense of the municipal legislature. Most of the general charter laws passed by state authorities during this period, and most of the special charters recently granted to cities, bear abundant testimony to the strength and apparent permanence of this movement, which seems to have its motive in a general feeling that concentration of power in the hands of a single executive official begets efficiency and is not dangerous when accompanied by a concentration of responsibility. Although the ultimate wisdom of the tendency has frequently been called in question, perhaps with good reason, its strength exhibits no symptoms of decline.

The location of extensive municipal powers in the hands of a single executive authority is not, however, as some students of the subject seem to assume, a distinctly American contribution to the science of city government. It has, on the contrary, been the most salient feature of the municipal system of France for almost a full quarter of a century. Maintained under proper supervision by the central authorities, it has not resulted in the creation of "municipal despots," but has served very noticeably to improve the efficiency of administration in the units of French local government.

The French municipal code of 1884, upon which the present municipal system of the republic rests, did not intend, apparently, that the mayor should be the chief organ of local administration.[1] On the contrary, the parliamentary commission which framed the code aimed to give the council the more influential place in the affairs of the municipality. The strong

[1] The best elaborate commentary on the code is Léon Morgand's Commentaire de la loi du 5 avril 1884 (7th ed., 2 vols., Paris, 1906). A convenient manual, which includes the texts of the various important ministerial circulars interpreting the law, is Ferdinand Dreyfus's Manuel populaire du conseiller municipal (Paris, 1904).

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

desire, however, to maintain the effectiveness of national control over local administration resulted in the mayor's being entrusted with a considerable number of administrative powers, which have, during the last twenty years or more, admitted of somewhat remarkable expansion. On the other hand, the restrictions which the code placed upon the length of council meetings, upon the range of the council's discussions and upon the other incidents of conciliar procedure have served greatly to weaken the influence of this body.

Every commune in France, and there are more than 36,000 of them, has substantially the same administrative organization. This is made up of a council, varying in size according to the population of the commune, a mayor and one or more adjoints or assistant mayors. The councilors are elected every four years by popular vote,[1] and all retire together. The mayor and the adjoints are elected by the newly elected council from the ranks of its own members for a similar four years' term. These elections take place without any formal nominations and by secret ballot. An absolute majority of votes is necessary to an election on the first or the second ballot; but if, after two ballots have been taken, no candidate has secured a clear majority, a plurality is sufficient to elect.[2]

Any member of the council may be selected as mayor; there are no special disqualifications and no requirements as to previous municipal service. As a matter of practice, however, it is unusual to select as mayor one who has not had at least one term of service as adjoint. Reëlections are common, especially in the smaller communes, where it is not unusual to find a mayor who has been in office continuously for twelve or even for sixteen years. In the larger cities a second term is not infrequent, but a third term as mayor is probably not more common than in the larger cities of the United States. The

[1] A detailed discussion of the franchise, the methods of preparing the voters' lists and the procedure in elections may be found in Juillet Saint-Leger's Les élections municipales (6th ed., edited by Vuillemot, Paris, 1904).

[2] The numerous rules laid down for the guidance of the council in the election of a mayor, together with a digest of the decisions of the administrative courts upon various disputed points, may be found in Saint-Leger's Les élections municipales, ch. xxx.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

French mayor receives no regular salary, but the council is empowered to vote annually such sum as it may deem a reasonable compensation to the mayor for expenses actually incurred by him in the direct service of the municipality. Expenses of this nature are sometimes very heavy in the larger cities, where the mayor is called upon to represent the commune on the occasion of the numerous fêtes and public ceremonies. The council is not, however, permitted to afford the mayor a virtual stipend under the guise of an allowance for expenses; for the sum thus placed in the municipal budget comes under the scrutinizing eye of the prefect, who takes care that there is no violation of the spirit of the law.

In electing a mayor, the municipal council usually divides along party lines; and where its members have been elected from different electoral districts or wards several partisan factions are likely to be represented at the council board. In this case the election frequently results from a successful coalition or "deal" between the members of different parties. Where, on the other hand, the election of councilors has taken place on a general ticket, the whole group of councilors is quite apt to represent a single faction or group. In such cases there is little or no open contest for the office, the whole matter being arranged by the factional leaders beforehand.[1] Complaints are frequently made that the chief administrative officer of the French city does not really represent the voters, and that direct election by the latter would result in the choice of a very different set of men. Nevertheless the class of men selected for the mayoralty in the larger cities has been satisfactorily high; and it is not often that anyone attains the office without prior successful service as councilor or as adjoint.

The results of the election must be duly notified to the higher local authorities—to the sub-prefect or the prefect, as the case may be. No approval on the part of these officials is necessary to the validity of the election, and no right of withholding ratification exists; but if the council has proceeded with the election in irregular fashion, or if it has selected as mayor any-

[1] On this point see Léonard Léonard's L'élection du maire de la commune par le nouveau conseil municipal—farce électorale (Paris, 1902).

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

one who is not legally qualified to hold the post, a formal protest may be lodged with the prefect by any voter. Such protests are duly considered by the council of the prefecture, which acts as an administrative court with original jurisdiction in all matters affecting municipal elections and the qualifications of municipal officers; and in every case appeal may be taken to the highest administrative court, the Council of State.[1]

The powers of the French mayor are not easy to define in general terms; for, although by the provisions of the code they are substantially alike in all of the 36,000 communes, large and small, the enormous difference in local conditions makes the actual exercise of them quite different in a large city like Marseilles or Bordeaux from that in a rural hamlet of a few hundred people. Much depends, furthermore, upon the character and the abilities of the individual who happens, for the time being, to hold the post. A mayor who so desires may leave almost everything to his adjoints and to the permanent heads of civic departments, thereby becoming as little influential in the direct guidance of municipal policy as the mayor of an English borough. On the other hand, a man of energy and individuality like M. Augagneur, the recent mayor of Lyons, may make of the office almost a municipal dictatorship. Usually, however, the French mayor goes to neither extreme.

The chief executive of a French city, as has often been pointed out, occupies a dual position—a fact which must be kept constantly in mind if any proper grasp of his place and powers is to be had. On the one hand, he is the administrative head of his municipality, the apex of the local framework of administration, selected by the elective organ of the commune and responsible to it for his actions. In this capacity he presides at all meetings of the council, makes his annual report to that body and represents the municipality in all legal proceedings as well as upon all ceremonial occasions.[2] As administra-

[1] Loi municipale du 5 avril 1884, § 79. As a rule, questions of fact upon which decisions have been given in the council of the prefecture may not be reopened before the Council of State.

[2] The best convenient source for any special study of the mayor's powers is G. Franceschi's Manuel des maires (2 vols., Paris, 1903). A less elaborate but useful

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

tive head of the municipality he also makes practically all appointments of municipal officials from highest to lowest, the only important exceptions being a few subordinate posts to which the council has by law the power of appointment. No confirmation of the mayor's appointments is necessary at the hands of the council; but in the case of police officials, as will be seen later, the approval of the prefect is required. For practically every municipal appointment the mayor is directly and entirely responsible. In the larger cities this power places in his hands an enormous patronage, particularly since there are no important limitations upon his freedom to choose appointees; for the cities of France have no system of civil-service examinations, and only for the technical posts is any specific qualification required by law. As a matter of fact, however, it is the practice of the mayor to make none but the more important appointments, leaving to his adjoints and to the permanent heads of civic departments a generous degree of freedom in filling the subordinate posts.

To the mayor is also given the power of suspending or dismissing any municipal officer, and this privilege is exercised without the concurrence of the council or the approval of any higher authority. The power of removal does not extend to the few officers whom the council appoints or to the police officials, who may not in any case be interfered with without the prefect's consent. It is worth noting that, when the mayor has the sole power of suspension or dismissal, his action is not subject to review by any civil court; nor may any compensation be awarded by these courts to a deposed official even when the action of the mayor can be shown to have been arbitrary or without good cause. The only authority which possesses power to review a mayor's action in this matter is the highest administrative court of the republic, the Council of State.[1] This

work is Durand de Nancy's Nouveau guide pratique des maires, des adjoints, des secrétaires de maires, et des conseillers municipaux (Paris, 1905). A very satisfactory short sketch of the mayor's powers and influence may be found in T. de Croissy's Dictionnaire municipal (2 vols., Paris, 1905), under "Maire."

[1] The law and practice relating to the appointment, suspension and removal of French officials, national, departmental and municipal, are discussed at length in

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

body, if it so determines, may reinstate a dismissed officer or may award damages to be paid to him out of the treasury of the municipality; but the cases in which such action has been taken are not numerous. This well established legal doctrine in France has relieved the mayors of what has often become an important evil in American cities—namely, the reinstatement in office, by the ordinary civil courts, of officials who have been suspended or dismissed by the chief executive of the city. Not that the aggrieved official is in France deprived of all redress; on the contrary, he sometimes obtains from the Council of State monetary compensation for dismissal which would in all probability never be awarded by any court in the United States. He must, however, in order to obtain his redress, show good cause to a tribunal which views the matter from the standpoint of the good of the service rather than from that of a protector of private rights.[1]

As administrative head of the municipality the mayor, under the control of the council, has general charge of the financial affairs of the commune. It is his duty to see that the revenues are properly collected and conserved, to draft the annual municipal budget and to submit it to the council at its regular May meeting in each year. Ordinarily the mayor is assisted in the compilation of the budget by his adjoints and by the various departmental heads, but the responsibility of securing its acceptance by the council rests with him alone.[2] The budget is usually divided into two sections, one comprising estimated receipts and the other estimated expenditures. The section dealing with receipts is again usually subdivided into two parts, one including ordinary and the other extraordinary revenues. The section dealing with expenditures is, in the case of the larger municipalities, par-

André Delest's Nomination et révocation des fonctionnaires (Paris, 1899); J. Drouille's Le pouvoir disciplinaire sur les fonctionnaires publics (Toulouse, 1900); and E. G. Perrier's De la révocation des fonctionnaires (Paris, 1903).

[1] An interesting discussion of this whole matter may be found in the decision of the Council of State in the case of M. Cadot, municipal engineer of Marseilles; *Revue générale d'administration*, 1890, I, 451 *et seq.*

[2] On the laws and procedure relating to municipal budgets, see A. G. Desbats, Le budget municipal (Paris, 1885); A. Rey, Théorie du budget communal (Paris, 1897); and Paul Dubois, Essai sur les finances communales (Paris, 1898).

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

celed into several subdivisions comprising such heads as "expenses of administration," "maintenance of municipal property," "pensions and charity," "police," "fire protection," "education" and so forth. The dossier is prepared in triplicate, and after the items have all passed the council a copy is transmitted to the prefect for his approval. If, however, the total revenue of the municipality is estimated at more than three millions of francs, another copy must be sent direct to the minister of the interior, for approval, on his advice, by the president of the republic.[1] In each case the copy of the budget must be accompanied by such municipal data (*e. g.* a copy of the mayor's report, the council minutes *etc.*) as may be of service to the financial experts who at the prefecture or at the ministry examine carefully the various items. The appropriate higher authorities have power to increase or to reduce any item in that section of the budget which deals with estimated receipts and thus to affect the annual tax rate of the commune; but in the case of items devoted to estimated expenditure they are restricted to the power of reduction alone. No new item of expenditure may be inserted in a municipal budget by the higher authorities, and no submitted item may be increased.

After due examination and correction the budget is promulgated by prefectoral decree. If necessary, a supplementary budget may be prepared by the mayor later in the year; and this is subjected to the same procedure as the regular budget. If the council should in any year fail to vote an item which by law must be inserted (*e. g.* the appropriation for the support of municipal police), the prefect may insert the omitted item; and if it should fail to vote any budget at all, the prefect may prepare an entire budget covering all necessary expenditures and put this into force by prefectoral decree.[2] In such case, however, the items placed in the budget must not exceed the average in the budgets of the three preceding years.[3]

In virtue of his position as administrative head of the municipality, the mayor is entrusted with the general management of

[1] Loi municipale du 5 avril 1884, § 145.

[2] *Ibid.* § 150.

[3] *Ibid.* § 149.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

all civic property, and this is, in many of the larger municipalities, of great and growing value.[1] Particularly is he charged with the acceptance and guardianship of gifts and legacies, which Frenchmen of means very frequently make to the commune for the furtherance of various local projects and activities.[2] No alienation or exchange of municipal property, however, may be made without the concurrence of both the prefect and the council; and for all alterations, improvements and repairs the council must first provide the necessary funds in the annual budget. The mayor is further entrusted by the municipal code with the supervision and direction of all civic works. He selects the architects who draw the plans, he appoints the engineers who secure conformity to plans in construction, he is responsible that the authorized expenditure is not exceeded, and he issues all warrants for the payment of moneys due.[3] To his particular care is committed the supervision of all matters relating to subsidiary or minor streets and passages. It is his duty to superintend the construction and repair of these, to see that private abuttors do not encroach upon them, to make rules for the regulation of traffic along them, and in general to see that they are kept reasonably safe and convenient. Over main or major streets he has no authority as a municipal officer, although as a police agent of the central government he possesses certain authority to regulate traffic upon these as well.[4]

[1] On this point see Imbart de la Tour's Des biens communaux (Paris, 1899); Roger Griffin's Les biens communaux en France (Paris, 1899); and Edmond Cléray's De la mise en valeur des biens communaux (Paris, 1900).

[2] The elaborate regulations relating to the acceptance and administration by communal authorities of private gifts and bequests (*dons et legs*) are set forth in La loi municipale, §§ 111–113.

[3] The exact powers and duties of the mayor in connection with the construction and repair of municipal works have been defined in a large number of decisions rendered by the administrative courts in cases brought before them from time to time. The gist of these decisions may be found in Léon Thorlet's Traité des travaux communaux à l'usage des maires (Paris, 1894). Reference may be made also to J. Lefournier's article on "Les battues communales," in *Revue générale d'administration*, 1888.

[4] The French make a clear distinction between the building, repair, policing and general administration of two classes of highways. The first, *la grande voirie*, comprises the supervision of all roads and streets which serve as main channels of communication and are in consequence much used by the residents of more than one

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

In addition to being the administrative head of the municipality, the mayor is the local agent of the central government. It is, indeed, in this capacity that he exercises some of his most important functions, and it is this aspect of his position that gives him much of his prestige. In the exercise of powers in this category the mayor is not subject to control by the council: his responsibility is to the higher central authorities alone, particularly to the prefect of the department in which his municipality happens to be situated.

First among the powers possessed by the mayor as a local agent of the central administration is that of organizing and controlling the system of municipal police. Throughout France, with only two exceptions,[1] the organization of city police is vested, in the first instance, with the mayor of the commune; but it cannot be too strongly emphasized that this police jurisdiction is exercised by him as a delegated function of national administration and not as a regular function of municipal government. This situation is the more strange in view of the fact that French municipalities are by law rendered financially liable to make good any serious damage to private property which may result from the inability of their police systems to cope with riots and other breaches of the peace.[2]

municipality; the second, *la petite voirie*, comprises the administration of subsidiary roads and side streets which are used almost exclusively by residents of a single municipality. The administration of the first class of streets is entirely in the hands of the national or departmental authorities and is exercised chiefly by the prefects and sub-prefects, although some police powers over these highways are entrusted to the mayor as local police agent of the prefect. Roads of the second class are wholly within the jurisdiction of the municipal authorities and are supervised by the mayor as administrative head of the local unit. The higher authorities decide whether a municipal street shall be placed in one or the other class; but in general all the main streets of any city are placed within the category of *grande voirie*. In Paris all the streets, whether main or not, are thus included. A somewhat old but very useful treatise on the subject is Alfred des Cilleuls's Traité de la legislation et de l'administration de la voirie urbaine (Paris, 1877).

[1] The exceptions are Paris and Lyons. In the former city, police control is vested in the hands of a special national officer called the prefect of police; in the latter, it is given to the prefect of the department of the Rhone.

[2] On this point see Jean Perrinjaquet, De la responsabilité des communes en matière de police (Paris, 1905); and Maurice Vel-Durand, De la responsabilité des communes en cas de dommages par des attroupements ou rassemblements (Paris, 1902).

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

The mayor appoints all police officers from the chief commissaire down to the ordinary gendarme, but his appointments to the higher posts must receive the approval of the prefect. Subject to prefectoral approval, he likewise regulates the pay, duties and uniform of the police officers, arranges the system of discipline, and makes the necessary promotions, suspensions and dismissals. In municipalities having a population of less than 40,000, the mayor is given a fairly free hand as regards the organization and control of the force, with the result that there is, in the smaller communes, a considerable divergence from uniformity. In cities of over 40,000, on the other hand, the general lines of municipal police organization are prescribed by presidential decree, and the mayor's discretionary powers are in consequence very much narrowed. There are at present forty-five cities whose populations exceed the prescribed limit, and for each of these a special presidential decree has been issued. All these decrees follow similar lines, but in matters of detail there are some important differences. Even within the limits marked off by the decrees, however, the police jurisdiction of the mayor in a large French city is considerable.[1]

The police powers of the mayor are not, however, confined to matters of organization and discipline. Even more important is his power to issue police ordinances or arrêts, which seek to regulate an extensive category of matters, many of which would not, in American cities, be left to the discretion of any administrative official. All regulations necessary for the carrying into effect of principles enunciated in the national laws, for instance, are drawn up and embodied in municipal police ordinances. In this connection it may be well to recall the French practice of passing and promulgating national statutes which do little more than enunciate principles or define general policies, leaving the whole range of detailed provisions to be worked out and applied by the hierarchy of administrative officials. When-

[1] The nature and scope of the mayor's police jurisdiction are dealt with at length in Léon Thorlet's Traité de police à l'usage des maires (Paris, 1891); and in Émile Muriel's Des rapports des municipalités et du pouvoir central au matière de police (Paris, 1897). A concise discussion of the subject may be found in De Croissy's Dictionnaire municipal, under "Police."

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

ever a national law seems to require an application of its principles in the local jurisdictions, the appropriate ministry, usually the Ministry of the Interior, issues a circular to the prefects of the eighty-seven French departments setting forth the new policy and indicating the general lines along which it is to be applied. This the prefects communicate to the mayors, whereupon the mayor of each municipality issues an arrêt making specific regulations in accordance with the provisions of the ministerial circular and the prefect's additional instructions.[1] In general these arrêts do not differ materially in the different communes, for the instructions are usually explicit; indeed, it is not uncommon for the ministry or the prefecture to send out the arrêts fully drafted. In any case, furthermore, the mayor is disposed to follow closely the customary forms.[2] At the same time his discretionary power is important in all cases, especially in the larger municipalities, where the municipal arrêts must make provision for very complicated contingencies.

In addition to the power of issuing arrêts applying in detail the provisions of national laws, the mayor possesses authority to publish, on his own initiative, any ordinances which he may deem necessary to the public safety (*surêtê gênêrale*), provided that these are not inconsistent with the general laws of the land. He may, for example, prescribe, by the issue of a municipal arrêt, the most drastic regulations for the prevention of epidemics, for the condemnation of insanitary buildings and for other matters incidental to the protection of the general health.[3] In recent years the scope of his discretionary powers in this sphere has been very much increased.[4] His authority with reference to the protection of property from fire is also broad. It is worth remark, moreover, that even for flagrant errors of

[1] This phase of the mayor's jurisdiction is discussed at length in M. Tchernoff's Du pouvoir réglementaire des maires (Paris, 1899).

[2] These forms are compiled, in convenient order, in G. Franceschi's Dictionnaire des formules ou mairie pratique (2 vols., Paris, 1903).

[3] Gustav Jourdain, Pouvoirs des maires en matière de salubrité des habitations (3d ed., Paris, 1900).

[4] Albert Guerlin de Guer, La protection de la santé publique: les pouvoirs des maires et la loi du 15 fevrier 1902 (Caen, 1903).

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

judgment in connection with the issue of these arrêts relating to the public safety the mayor cannot be held responsible in the ordinary civil courts.[1] Redress, if had at all, must be obtained from the administrative tribunals, the council of the prefecture or the Council of State; and the redress afforded by these bodies is reasonably liberal—more so, in fact, than foreign students of French administrative organization have usually appreciated.[2] It is an error to suppose that a division of jurisdiction between ordinary and administrative courts necessarily reduces the remedial rights which an injured private interest is able to assert against the acts of public authority.[3]

This ordinance power of the French mayor, however, places in his hands an authority which, in the cities of the United States or of Great Britain, is very rarely committed to any administrative official or even to an administrative board. It is not a mere administrative power; it is in every sense a delegation of the sovereign legislative authority of the state—an authority to make laws in accordance with a defined general principle, not simply a function of administering the provisions of laws already made. It is the practice of Anglo-Saxon legislatures so to frame laws that their provisions will cover every contingency which may arise; and if these provisions bear more heavily upon one community than upon another there is no legally recognized method of varying the pressure. American and British lawmakers have been extremely chary of anything which might be deemed a delegation of legislative power to any administrative official or board of officials. The French, on the other hand, by delegating a limited amount of actual legislative authority to the president of the republic, to the prefects, to the sub-prefects and to the mayors, have secured a

[1] Tribunal des Conflits, March 2, 1900, in *Revue générale d'administration*, July, 1901, pp. 309–311.

[2] Edouard Perrin, De la competence réglementaire des maires, et des voies de recours contre leurs arrêtés (Paris, 1904).

[3] This point has been brought out very clearly in E. M. Parker's discussion of "State and Official Liability" in *Harvard Law Review*, March, 1906, pp. 335–350. See also F. J. Goodnow, "The Executive and the Courts," in POLITICAL SCIENCE QUARTERLY, I, 533–559 (December, 1886), especially pp. 544 *et seq.*

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

certain degree of elasticity and adaptability to local conditions in the substance of the law as well as in its administration.

From time to time the French mayors have been entrusted, by national law, with special functions which they exercise as local agents of the central authority. Although the number of these special powers has become very large, many of them are of minor importance, requiring but little attention and that at considerable intervals. Others are of high importance, involving a heavy share of the mayor's attention and placing upon the staff of the mairie a large amount of routine work.

Among the more important of the special functions thus entrusted to the mayor may be mentioned the local supervision of the *état civil*,[1] of which every mayor is ex-officio registrar. In his absence or incapacity this post devolves upon the senior adjoint. The system of *état civil* involves the preparation and accurate maintenance of a register of all births, marriages and deaths taking place within the municipality, together with many other data concerning the municipal personnel. It is the duty of the mayor to issue the *actes de naissance*, and to see that such subsequent endorsements are made upon these as may be provided for by law. Within the mayor's jurisdiction comes also the whole complicated procedure preliminary to the contracting of civil marriage, and this work alone concentrates at the mairie of any large city a great deal of clerical routine.

Again, legal responsibility for the proper local administration of the laws relating to compulsory military service has been imposed upon the mayor, who acts in this regard as the local agent of the Ministry of War. He prepares each year a list of persons liable to service, and this list, after due publication and revision, he transmits through the prefect to the proper military authorities. It is his task to see that those who are subject to military service are duly sent forward to the appointed place to begin their training, and, on the other hand, that those who are not called upon for service pay their prescribed imposts in lieu thereof. He is required to compile, and to keep constantly

[1] An account of the system of supervising the *état civil*, with examples of the forms used, may be found in Charles Ragel's Manuel formulaire des actes de l'état civil à l'usage des maires (Paris, 1898).

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

revised and up-to-date, various rosters showing the number of trained and untrained men within his municipality capable of bearing arms, together with lists of horses, vehicles, arms, carrier-pigeons and other supplies which might be requisitioned by the national authorities in the event of war. In fact the efficiency of the French military system depends largely upon the work continually going on at the mairie of every commune.[1]

Important as are the military functions of the mayor in years of peace, they become doubly so in time of war or of preparation for war. At such crises the mairie becomes at once the local depot of the war ministry for the collection and transmission of supplies, horses, forage and so forth, as well as in all the incidents connected with mobilization, such as the securing of transportation for troops and reserves, the providing of rations for bodies of men en route through the municipality, the surveillance of aliens, strangers and suspicious persons, and the securing of information of all sorts for the use of the military authorities. The 36,000 mayors of France at once become so many military agents of the central government.[2]

Various other tasks of somewhat less importance have been thrown by law upon the shoulders of the mayor. He is responsible for the proper preparation of the voters' lists used in the national and departmental elections, for the exercise of divers minor functions connected with the administration of the government monopolies (such as the tobacco monopoly) and for a good deal of the work incident to the taking of the national quinquennial census. He is expected to preside at meetings of the local school commission and to perform various functions relating to the supervision of primary education. He is president of the commission which manages the local poor-relief bureau (*bureau de bienfaisance*), and is expected to be a leader in all local philanthropic enterprises. An enumeration of all the minor responsibilities which a paternal government has laid upon the mayor would make up a very formidable list.

[1] See Léon Bauer's Les devoirs des maires et des municipalités en ce qui concerne l'armée (Paris, 1894).

[2] These military duties are explained in detail in Paul Dislère's Les devoirs des maires en cas de mobilisation générale (Paris, 1893).

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

From the foregoing general enumeration of mayoral functions it may be concluded that the mayor of a large French city must be a pretty busy man; and one may be pardoned for wondering why any citizen should feel disposed to assume such a heavy load of detailed responsibilities without any remuneration whatever. It has been estimated that the French mayor has more than five hundred specific official acts to perform in the course of each year, each of these to be done at a definite time and in a prescribed way. This does not include, moreover, his general duties of issuing arrêts, of supervising and maintaining streets, of caring for the public health and safety and of preparing and putting his budget through the council. He is, in the words of one writer, "loaded with innumerable and absorbing functions." [1]

But while the mayor may be, "for those whom he governs, an almost absolute master," [2] it should never be forgotten that all his acts as agent of the central government are performed under the strictest surveillance and control. He may be suspended from his office by the prefect for a period not exceeding one month, and this suspension may be extended to not more than three months by the minister of the interior. He may, by presidential decree, be removed from office altogether, and in this case may not be re-elected by the council for the space of one year.[3] These powers of suspension have not, it is true, been used in any arbitrary fashion; but when a mayor has proved obstreperous or inefficient the higher authorities have not hesitated to make use of them. Since, moreover, the prefect is responsible to the minister of the interior, who in turn must justify his acts, when called upon, in the Chamber of Deputies, the individual deputy is brought into indirect but none the less influential relation to local administration. A mayor who incurs the antagonism of a ministerial deputy is liable to discover the consequences in the course of his relations with the prefecture. There is much complaint that the national authorities expect far too much from the mayors in the way of

[1] Paul Deschanel, La décentralisation (Paris, 1895), pp. 7 *et seq.* [2] *Ibid.* p. 8.

[3] La loi municipale du 5 avril 1884, § 86.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

supporting the party or group of parties in power at Paris. Still the system of using the mayors as local agents of the national government has, on the whole, secured effective centralization without the creation of a great local bureaucracy.

Although the mayor is directly responsible for the prompt and proper performance of all the above-mentioned functions, the actual work is of course, in the larger municipalities, distributed among the adjoints, who in turn cast most of the routine upon the permanent civic officials and employees. In this distribution of tasks among the adjoints the mayor has entire discretion: he may assign an adjoint much or little to do, or he may even leave him to serve his term without any duties at all. While the mayor may not remove an adjoint from office, he can thus relieve him of any official duties. As a matter of practice, however, different departments of civic administration are apportioned among the adjoints as their qualifications and experience seem to dictate, the mayor as a rule retaining police matters as his own share. The adjoints thus perform functions similar to those which, in the cities of England, are assumed by the various standing committees of the council. The system, it will be noted, concentrates all administrative responsibility upon the mayor. For the performance of the routine work at the mairie the staff is divided into four bureaus,[1] each with its chief and deputy-chiefs. The effectiveness with which the mayor's various duties are performed will depend, therefore, upon the capabilities of his adjoints, of the permanent heads of departments and of the staff at the mairie.

Even so elementary a discussion of the mayor's duties as the present would be incomplete if it failed to make mention of one permanent municipal officer upon whom both the mayor and the adjoints have come to lean very heavily, the secretary of the mairie. Every commune in France numbers this officer among its permanent employees, in the smaller villages the post being regarded as one of the perquisites of the local schoolmaster. In the larger municipalities the *secrétaire de mairie* is a profes-

[1] These bureaus are ordinarily (1) secrétariat, (2) bureau de l'état civil, (3) bureau militaire, (4) bureau de police. An outline of the work performed by the bureaus may be found in De Croissy's Dictionnaire municipal, under "Mairie."

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

sional and well-paid official, who devotes his whole time and energies to the duties of his office. Through his long tenure in office he becomes the custodian of communal traditions, a local authority upon points of municipal law and procedure to whom all may turn for information, and in many ways the most influential officer among the whole staff of civic employees. He is to the municipal authorities of France what the town clerk is to the civic authorities of England; he is even more, for his duties are much more numerous, more varied and more responsible because of the large measure of dependence which the central government places upon local administration. The efficiency of municipal government depends to a large degree upon the ability, accuracy and tact of the secretary, and upon the discipline and *esprit de corps* which this official is able to maintain among the staff of the mairie of which he is the chief. Without him the system of local administration would soon become clogged, and the mayor himself would probably become hopelessly entangled in the multitude of functions pertaining to his own office. Although the secretary, like the English town clerk, does more than any other single official to keep municipal administration working smoothly, students of local government have not always fully appreciated the importance of his position. A recent study of the office, however, has now rendered a proper recognition of his services more probable.[1]

In speaking of the mayor's duties one should not overlook, furthermore, the heavy shares borne in French municipal administration by the treasurer, the chief police commissioner and the other permanent heads of civic departments.[2] The dependence placed by the mayor upon all these officers is very great, and the latitude allowed to them within their various spheres is even wider than that permitted to administrative officials in English, German or American cities. This is partly because, although a committee of the municipal council is appointed for each important department, these committees have purely ad-

[1] R. Martineau, Les secrétaires de mairie (Paris, 1906).

[2] The position and functions of the chief municipal employees are discussed in Doisnel and Gaudoin's Les secrétaires de mairie et employés communaux (Elbeuf, 1902).

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

visory functions and exercise little controlling influence upon the course of departmental policy. The functions of the French council committee are not nearly so extensive as those of the English committee or the Prussian *Deputation*. For the proper administration of his individual department, the French permanent official is responsible, through the adjoint in charge, to the mayor alone. He may, moreover, be removed by the mayor at any time, subject of course to the right of appeal to the administrative courts; but as a matter of fact he is never removed except for good cause. Length and security of tenure begets in him an expert knowledge of his department, upon which the mayor, who is after all an amateur, finds himself disposed to rely.

In general it would not be too much to say that the cities of France are administered very largely by a corps of permanent municipal officials acting under a broad range of authority committed to them by the mayors. French municipal administration, while apparently vested in the hands of amateurs, is in reality carried on by a corps of professional civic administrators. The concentration in the hands of the mayor of a wider category of important powers than is vested in the chief executive of any American city has not served to make the French administrator a municipal despot or a municipal drudge. It has enabled the French to preserve the outer forms of an elective, non-bureaucratic municipal government, and at the same time to secure the efficiency which comes from the actual performance of administrative functions by skilled and experienced officials, who, secure in the tenure of their posts, go about their work with little or no captious interference from the elected representatives of the people. French municipal experience has, in fact, tended to emphasize the canon of political science, that the concentration of powers in a single hand makes for administrative efficiency, while, if accompanied by the proper degree of responsibility, such policy is in no wise dangerous or undemocratic.

WILLIAM BENNETT MUNRO.

HARVARD UNIVERSITY.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

SOME PROBLEMS CONNECTED WITH THE ROMAN GENS

AS a supplement to the study of the Roman *populus* made in the preceding volume of this periodical,[1] the present paper will consider a group of problems relating to the Roman *gens*, for the purpose not only of determining the nature and historical bearings of this association but also of throwing further light on the patriciate. A current view of the *gens* includes the following positions: (1) that it was exclusively patrician; (2) that the clients were dependents of the association as a whole, that they bore the gentile name of their patron, shared in the gentile *sacra* and were in a subordinate capacity members of the *gens;* (3) that the *gens* was a corporation with a formal chief; (4) that there were once exactly three hundred patrician *gentes*, whose membership was sufficiently numerous to make up the entire citizen body; (5) that they were older than the state, which was formed by their aggregation. This view is held in whole or in large part by most modern scholars. For right or wrong it must profoundly affect their conception of the character and history of early Rome. Whether it is well founded and, if not, what was the real nature of the *gens* with reference to the points here enumerated will be the subject of the present study.

First, however, it is necessary to attempt a definition of the *gens*. Scaevola's definition, quoted by Cicero,[2] is as follows: "Those are *gentiles* of one another[3] (1) who have the same

[1] XXI, 498–526.

[2] Topica, 6, 29: "Gentiles sunt inter se, qui eodem nomine sunt. Non est satis. Qui ab ingenuis oriundi sunt. Ne id quidem satis est. Quorum maiorum nemo servitutem servivit. Abest etiam nunc. Qui capite non sunt deminuti. Hoc fortasse satis est. Nihil enim video Scaevolam pontificem ad hanc definitionem addidisse." *Cf.* Cincius, in Festus, epitome, 94: "Gentiles mihi sunt, qui meo nomine appellantur."

[3] As the word itself indicates, *gentiles* are members of a *gens*, and no other members are known to the sources. If it were true, as Mommsen, Römisches Staatsrecht, III, p. 66, supposes, that there were dependent members not termed *gentiles*, a name would

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

name, (2) who are born of free parents, (3) none of whose ancestors have been in slavery, and (4) who have not suffered *capitis deminutio*." Notwithstanding Cicero's satisfaction with its completeness, the statement is in some ways defective. Article 1 takes no account of those persons who, being neither freedmen nor the descendants of freedmen, have acquired the name of a given *gens* without becoming in any sense members of it. An alien on receiving the citizenship was often given the *gentilicium* of the person through whose influence the favor was granted, and the sources offer no suggestion of a gentile relationship between the new citizen and his benefactor. Identity of name between old and new citizens must often, too, have been accidental.[1] Article 4 makes no allowance for those simple cases of *capitis deminutio* involved in a transfer from one family to another within the *gens*, as through adoption.[2] Then, too, the definition is purely practical, and hence has no reference to the history of the institution. The Romans believed the members of a *gens* to be usually descendants of a common ancestor, as may be inferred from other definitions which include a theory of its origin;[3] and their view is corroborated by the meaning of the word itself as well as by other evidence to be presented in the course of this discussion. The principle of blood relationship, however, does not apply to those who enter the *gens* by marriage or adoption. Those blood relatives, on the other hand, were excluded who had suffered any degree of diminution of the *caput* which entailed either total loss of gentile rights—such as capture in war or sale into slavery—or transfer from one *gens* to another.[4]

have been given this dependent relation, or the jurists would have defined it, or at least some ancient writer would have mentioned it.

[1] Many of the Aemilii enumerated in Pauly-Wissowa, Real-Encyclopädie I, 544 *et seq.*, could have had no connection with the patrician *gens* of that name, which became extinct under the early empire.

[2] *Cf.* Michel, Du droit de cité romaine, pp. 167 *et seq.*

[3] *Cf.* Varro, De Lingua Latina, viii, 4: "Ut in hominibus quaedam sunt agnationes ac gentilitates, sic in verbis; ut enim ab Aemilio homines orti Aemilii ac gentiles, sic ab Aemilii nomine," *etc.* Fest. ep. 94; Isidorus, Etymologiae, ix, 2, 1; 5, 11; Fustel de Coulanges, Ancient City, pp. 141 *et seq.*; Michel, *op. cit.* p. 164.

[4] On *capitis deminutio* see Gaius i, 159–164 (comment by Poste, pp. 98 *et seq.*); Digesta, iv, 5; Roby, Roman Private Law, I, pp. 80 *et seq.*

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

The subject of Scaevola's definition, it will be noticed, is not *gentiles* absolutely but *gentiles inter se*—members of the same *gens*. A person, for instance, who passed by *adrogatio* from one *gens* to another remained a *gentilis*, though not of his native association. The second and third articles were framed from the point of view of those who had no trace of servile blood in their veins, in order to exclude from gentile association with themselves their *libertini* and the descendants of the latter, who often bore the *gentilicium* of the manumitter. Doubtless the members of a *gens* took pains to keep alive in perpetuity this distinction of birth. As article 4 does not deny *gentilitas* to a person excluded from a *gens* by adoption into another, articles 2 and 3 do not deny it to *libertini* and their descendants. Debarred from common *gentilitas* with those for whose benefit the definition was framed, they were not on that ground kept from gentile connections with one another.[1]

The laws of the Twelve Tables relating to inheritance and tutelage[2] assume the existence of *gentiles* beyond the circle of the determinable agnates; hence they conceive of the *gens* as a group of families. The widest and most complete type was an association of families of the Roman form, living apart yet bound together by the twofold tie of blood—real or assumed—and religion in the mutual obligations and benefits of inheritance, tutelage and general helpfulness—open to males outside through adoption only, or to women by way only of marriage, and retaining in perpetuity its agnatic lines of descent with the exception of such persons as were legally transferred to other *gentes*, captured in war or sold into slavery. Some *gentes* reached this degree of extension; others fell far short of it.

I. The Relation of the Gentes to the Social Classes

A much discussed question is whether the *gens* was an exclusively patrician institution or common to the two great social classes. From the circumstance that patricianism is not given as an element of Scaevola's definition, we may at once conclude that in his time plebeians, too, were *gentiles*. This conclusion is supported by a variety of evidence.

[1] *Cf.* page 676 *infra*.

[2] *Cf.* page 667, n. 4 *infra*.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Several plebeian *gentes* are mentioned, including the Minucia and the Octavia,[1] the Lutatia,[2] the Calpurnia,[3] the Domitia,[4] the Fonteia,[5] the Aurelia [6] and the Licinia.[7] Some *gentes* comprised both patrician and plebeian families, as the Cassia,[8] the Claudia,[9] the Cornelia,[10] the Manlia,[11] the Papiria,[12] the Publilia or Poplilia,[13] the Aebutia [14] and the Servilia.[15] Not only do the sources mention several plebeian *gentes* by name, but they clearly imply in other ways the existence of such associations. Livy [16] expresses the patrician sentiment that "it would seem an affront to the gods for honors to be vulgarized and for the distinction between *gentes* to be confused at auspicated *comitia*" (by the election of plebeians to the consular tribunate). "The distinction between *gentes*" can only mean the distinction between patrician and plebeian *gentes*—an interpretation confirmed by a similar statement of Cicero [17] to Clodius, who had passed by adrogation from a patrician to a plebeian *gens*: "You have disturbed the

[1] Cicero, Brutus, 16, 32; Livy iv, 16, 3; Suetonius, Augustus, 2. Whether these two *gentes* had ever been patrician does not affect the question at issue.

[2] Valerius Maximus ix, 2, 1.

[3] Cicero, De Haruspicum Responsis, 15, 32, mentions *sacrificia gentilicia* of the Calpurnii.

[4] Suet. Nero, 1.

[5] Cic. De Domo Sua, 13, 35.

[6] Fest. ep. 23.

[7] Varro, De Re Rustica, i, 2,10.

[8] Unless Sp. Cassius, consul 502, 493, 486 B. C. and author of the first agrarian rogation, is a myth; *cf.* Drumann-Gröbe, Geschichte Roms, II, p. 94.

[9] *Cf.* Cic. De Oratore, i, 39, 176. The patrician and plebeian branches are sometimes spoken of as distinct *gentes*; Suet. Tiberius, 1.

[10] Mommsen, Römische Forschungen, I, pp. 113 *et seq.*; Drumann-Gröbe, *op. cit.* II, p. 359.

[11] Cic. Philippica, i, 13, 32: Gellius ix, 2, 11; Fest. ep. 125.

[12] Mommsen, Röm. Forsch. I, p. 116.

[13] L. Poplilius Volscus, patrician; Livy v, 12, 10. Q. Publilius Philo, plebeian; Livy viii, 15, 9.

[14] This patrician *gens* included an Aebutius who was plebeian tribune (Cic. De Lege Agraria, ii, 8, 21) and several other plebeians; Klebs, in Pauly-Wissowa, Real-Encycl. I, 442 *et seq.*

[15] Mommsen, Röm. Forsch. I, pp. 117 *et seq.*

[16] V, 14, 4: "Comitiis auspicato quae fierent indignum dis visum honores volgari discriminaque gentium confundi."

[17] Dom. 13, 35: "Ita perturbatis sacris, contaminatis gentibus, et quam deseruisti et quam poluisti."

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

sacra and contaminated the *gentes*, both the one you have deserted and the one you have defiled" (by your admission into it). To our other proofs we may add the consideration that the very expression *gentes patriciae*[1] implies the existence of plebeian *gentes*. It is natural then that Varro[2] should make *gentilitas* a condition of men in general. In asserting that there were a thousand gentile names, the same authority[3] must have included those of plebeians, for scarcely a hundred belonging to patricians could have been known to him. By no means the weakest argument in favor of the view here presented is the fact that the laws of the Twelve Tables concerning inheritance, tutelage,[4] *etc.*—which applied not to the patricians alone, but to the whole citizen body—assumed that every citizen in full possession of his civil rights belonged to a *gens*.

A passage often interpreted against the existence of plebeian *gentes* is Livy x, 8, 9: "Vos solos gentem habere." In this case the plebeian speaker says the patricians claim that they alone have *gens* (not *gentes*). The speaker goes on to show how his own family is coming into the possession of an illustrious pedigree; he can cite a father who was consul, and his son will be able to cite a grandfather.[5] This connection shows that *gens* is here used in the sense of illustrious birth, as is sometimes our word "family."[6] Wherever a nobility exists it necessarily lays greater stress on descent and family than do the people, and in all countries the nobles are in a far better position to keep up family connections than are the commons. Naturally, therefore, at Rome we hear more of patrician than of plebeian *gentes*. But

[1] Sallust, Iugurtha, 95, 3; Livy iii, 27, 1; 33, 9; vi, 11, 2; Gellius x, 20, 5; *cf.* ix, 2, 11.

[2] L. L. viii, 4, quoted p. 664, n. 3.

[3] Incerti Auctoris Liber de Praenominibus, 3.

[4] It will suffice to quote Gaius iii, 17: "Si nullus agnatus sit, eadem lex XII Tabularum gentiles ad hereditatem vocat." *Cf.* Cic. In Verrem, i, 45, 115: "Lege hereditas ad gentem Minuciam veniebat." The Minucian *gens* was plebeian. Its right to the inheritance in question rested on this law of the Twelve Tables.

[5] *Cf.* POLITICAL SCIENCE QUARTERLY, XXI, pp. 502 *et seq.*

[6] *E. g.* "Family will take a person everywhere"; C. D. Warner, quoted by the Standard Dictionary, *s. v.*

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

in view of all the facts mentioned above there should be no doubt as to the existence of the latter. Niebuhr,[1] however, declared the *gens* to be an exclusively patrician institution, and he was followed by Schwegler,[2] Lange [3] and others. Mommsen [4] admits that the plebeians possessed gentile names, gentile *sacra* and the *ius gentilitatis*, and formed associations called *gentes*. Yet in his opinion these societies were not really *gentes*, but *stirpes*.[5] He does not state, however, what quality is needed in the plebeian associations to make them *gentes*, and he neglects to explain on what principle he brands as inaccurate every application of the word *gens* to plebeian associations. He bases his distinction between *gens* and *stirps* on a passage in Cicero,[6] which informs us that when the Marcelli by right of *stirps* put in a claim to inherit the estate of a freedman's son, the patrician Claudii by right of *gens* asserted a counter claim. The case is complicated by the circumstance that the deceased, who must have died intestate and without heirs, was not himself a *libertinus* but an *ingenuus*, and hence stood in no known relation to the Claudian *gens* or to any member of it.[7] Probably it was the vague nature of the claim which led to the litigation between the two branches of the *gens*. The question, however, was certainly not between patricians and plebeians, but between a whole *gens* and a particular family (*stirps*). As the nearest agnate excluded the rest of the agnates,[8] so (the Marcelli must have insisted) the nearest group of *gentiles* excluded the rest of the *gentiles*.[9] The patrician Claudii must have claimed not the

[1] Römische Geschichte, I, p. 337 (English translation, pp. 164, 200).

[2] Römische Geschichte, I, p. 612.

[3] Römische Altertümer, I, pp. 214, 216.

[4] Röm. Staatsr. III, pp. 74 *et seq.*; *cf.* p. 15, where he states that plebeians came to be called *gentiles* when the *ius gentilitatis* was extended to them.

[5] *Cf.* Abriss des römischen Staatsrechts, pp. 9 *et seq.*

[6] Orat. i, 39, 176: "Quid? qua de re inter Marcellos et Claudios patricios centumviri iudicarunt, quom Marcelli ab liberti filio stirpe, Claudii patricii eiusdem hominis hereditatem gente ad se redisse dicerent, nonne in ea causa fuit oratoribus de toto stirpis et gentilitatis iure dicendum?"

[7] *Cf.* Roby, Rom. Priv. Law, I, p. 221, n. 1.

[8] Ulpian, Fragmenta, 26, 1 (quoting from the XII Tables).

[9] *Cf.* Lange, Röm. Alt. I, p. 218; Genz, Das patricische Rom, p. 17, n. 2.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

whole estate but their share of it as *gentiles*; for on no known principle of Roman law could the right of inheritance of plebeians be set aside in favor of patricians. In this passage *stirps* designates the family; but when applied to the *gens* it is not confined to plebeians.[1] More cogent than all speculation on the subject is the fact that Cn. Cornelius Scipio Hispanus, probably praetor in 139 B. C., a patrician, referred to his lineage and family as *genus* and *stirps*,[2] and that in the earliest extant Latin literature *stirps* has a decidedly patrician flavor.[3] Having arrived at the conclusion that the *gens* was by no means an exclusively patrician institution, we have a right to infer from the law of the Twelve Tables here cited that as early at least as the decemviral legislation the state regarded as *gentiles* all citizens, plebeian as well as patrician, who were in undiminished possession of their *caput*. Other considerations will make it appear probable that in origin the plebeian *gentes* were little if any later than the patrician.[4]

II. *The relation of the gentes to the clients*

A closely related problem is whether in any sense the clients were members of the *gentes*. As one phase of the question we may inquire whether they were, as some have asserted, "clients of the *gentes*." In answer it is first to be noticed that in all the passages bearing on the subject the patron is an individual, not a family or *gens*. According to Cicero,[5] Romulus distributed the plebeians in clientage among the leading men. Dionysius[6] informs us that Romulus placed the plebeians as a trust in the hands of the patricians, allowing each of the *plebs* to choose whatever patron he wished. These are illustrations of the

[1] Livy i, 59, 1, speaks of the Tarquinian *gens* as *stirps*. Sometimes the patrician *gens* is termed simply *familia*; Livy i, 7, 12; ix, 29, 8 *et seq*. In Isid. Etym. ix, 5, 11, the *gens* Cornelia is at once *familia* and *stirps*.

[2] Corpus Inscriptionum Latinarum, I, 38:

"Virtutes generis mieis moribus accumulavi,
Progeniem genui, facta patris petiei.
Maiorum optenui laudem, ut sibei me esse creatum
Laetentur: stirpem nobilitavit honor."

[3] See the passages collected by Köhm, Altlateinische Forschungen (1905), p. 21.

[4] Page 690 *infra*. [5] De Republica, ii, 9, 16. [6] II, 9, 2.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

universal usage of ancient writers. In the cases here given and in many others they had ample opportunity to mention the *gens*, were it indeed the patron. If, assuming the patron to have been a *gens*, we should attempt to realize the customs of the Romans, we should everywhere fall into absurdities. On that supposition the death of Hispala Fecenia's patron[1] would signify the extinction of a *gens!* Custom required the patron to testify against cognates in favor of a client;[2] but a *gens* could not have cognates, nor could it testify. The principle that clients stood next to wards[3] would be inconceivable if the patron were a *gens*, which certainly could not be a guardian. It would be impossible, too, to conceive of the patron as next to the father,[4] if the former were a *gens*. A law of the Twelve Tables devotes to destruction the patron who defrauds his client.[5] It is difficult to see how an entire *gens* could be thus guilty of fraud, and there is no evidence that Roman law regarded the *gens* as a corporation capable of committing a misdemeanor or of suffering legal punishment. In this case it would be absurd to consider the patron otherwise than as an individual. Only when several generations of clients are concerned, and it is impossible to speak of an individual patron, is reference made to the family or house of the patron. In this connection family is not a group of persons living at any one time but rather the ancestral line of patrons extending through the generations.[6]

The traditional customs of the Romans here mentioned take it for granted that the patron was an individual. These proofs are sufficient, especially as no instance has been shown in which the sources represent the family or *gens* as a patron.[7] Since

[1] Livy xxxix, 9, 7.

[2] Cato, in Gell. v, 13, 4: "Adversus cognatos pro cliente testatur; *cf.* § 5.

[3] Gell. v, 13, 2; *cf.* § 4. [4] *Ibid.* § 4.

[5] Servius, In Vergilii Aeneidem Commentarius, vi, 609.

[6] Plutarch, Marius, 5: Τοῦ δ' Ἐρεννίων οἴκου τοὺς Μαρίου γονεῖς καὶ Μάριον αὐτὸν ἐξ ἀρχῆς γεγονέναι πελάτας.

[7] Suet. Tib. 1 ("Patricia gens Claudia . . . Roman . . . cum magna clientium manu commigravit") does not state that the clients mentioned were dependents of the *gens*, and elsewhere we are informed that their patron was Appius Claudius, the chief man in the *gens;* Livy ii, 16, 4.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

clientage was hereditary, however, the family and *gens* felt an interest in the clients of a member, in the same way in which they interested themselves in his property and reputation. In fact it was the duty of kinsmen to assist a patron in protecting his clients. But this obligation does not prove that the clients belonged to the family or *gens* in any stricter sense than did the wealth or prestige of individual members.[1] Even in the patronage of states—in which the hereditary character of the relation is necessarily accentuated—the patron is as a rule an individual.[2] Rarely patrons of a single community are mentioned,[3] but in some instances reference may be to a special commission, probably the patron and his advisers, appointed to look after its affairs; and a colony might have several founders, who according to custom became its patrons.[4] But in any case a plurality of patrons, where such a condition existed, was far from being gentile patronage.

One passage bearing on the subject requires especial notice. Livy[5] tells us that the Syracusans begged Marcellus to receive them and their city in clientage to himself, but makes no mention of his family or *gens*. Doubtless all the Marcelli felt the honor and to some extent the responsibility attaching to the new position acquired by one of their number; and accordingly C. Claudius Pulcher, appointed by the Senate in 95 B. C. to give laws to a certain Sicilian town, consulted in this function

[1] C. Caesar, in Gell. v, 13, 6: "Neque clientes sine summa infamia deseri possunt, quibus etiam a propinquis nostris opem ferre (or fieri) instituimus." Genz, Patr. Rom, 19, supposes that this statement proves the clients to belong to the *gens*, but it indicates the opposite: not only must a patron aid his clients but also the patron's relatives; the relatives are not patrons of the clients in question.

[2] C. Fabricius, consul in 278 B. C., was patron of all the Samnites; Val. Max. iv, 3, 6: "Universos (Samnites) in clientela habebat." Appian, Bellum Civile, ii, 4, 14 (*ὥσπερ ἁπάσαις πόλεσιν ἐστι τις ἐν Ῥώμῃ προστάτης*), distinctly states that the patron was some one person, and mentions Fabius Sanga, not his *gens*, as patron of the Allobroges. In stating that those who received the surrender of conquered communities became their patrons, Cicero, Off. i, 11, 35, had an excellent opportunity to mention the patronage of the *gens*, had such a thing existed.

[3] Livy ix, 20, 10.

[4] Patrons of the colony and town of Pompeii are mentioned; Plut. Sulla, 21; *cf.* Mommsen, Röm. Staatsr. III, p. 776, n. 1.

[5] XXVI, 32, 8.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

all the Marcelli who were then living[1] (not the whole Claudian *gens*). Claudius was appointed because he chanced then to be praetor, and he chose all the Marcelli as advisers in the work because he needed several advisers according to custom, and because the Marcelli were interested in Sicilian affairs. This interest, however, did not make the family as a whole the patron of Sicily.[2] In brief the modern theory of a gentile patronage of protected communities finds no support in the sources.[3] Only the patronage of freedmen, because of its involving the right of inheritance, passed equally to the agnatic descendants of the nearest degree, all of whom accordingly became patrons.[4] This fact, too, so far as it bears on the question at issue, tends to disprove the theory of gentile patronage.

It might be imagined that a man was patron not as an individual but as head of a *gens*, were it not that any person, whatever his station, was patron of his own *libertini* and that, so far as is known, the *gens* did not have a formal head.[5] Such a supposition could find no evidence in its favor.

Having disposed of the theory of gentile patronage, let us next inquire whether clients were members of their patron's *gens*. A point might be made in favor of the affirmative, if it could be established that clients bore the gentile name of their patron. That in historical times freedmen ordinarily received the *gentilicium* of their former master cannot be disputed.[6]

[1] Cic. Verr. ii, 49, 122.

[2] The statement of Cicero, In Caecilium, 4, 13 ("Omnino Marcellorum nomini tota illa provincia adiuncta est") is sufficiently explained by the fact that the patronage of the whole province was hereditary in that family. Similarly a decree of the Senate in 117 B. C. (C. I. L. I, n. 199) assigned the settlement of certain disputes in which Genoa was involved to two Minucii Rufi, descendants of the Q. Minucius Rufus who had subdued the Ligurians in 197 B. C. (Mommsen, Röm. Staatsr. III, p. 1203, n. 1). The whole Minucian *gens* was not called on.

[3] The theory is held by most modern scholars; *cf.* Von Premerstein, in Pauly-Wissowa, Real-Encycl. IV, 36; Genz, Patr. Rom, p. 19 *et seq.*; Bloch, Origines du sénat romain, p. 107; Willems, Le sénat de la république romaine, I, 7. Mommsen's statement (Röm. Staatsr. III, 65) that the patronage of a conquered community belonged to the conquering general and to his heirs is nearer the truth.

[4] *Cf.* Roby, Rom. Priv. Law, I, pp. 82 *et seq.*, and his citations from the Digest.

[5] *Cf.* page 677 *infra*.

[6] Mommsen, Röm. Staatsr. III, pp. 77, 427.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

This usage did not make freedmen members of the *gens*, for Scaevola's definition admits among the *gentiles* only those who are born of freemen.[1] That the giving of the name was intended not for fixing the future status of the freedman, but at most as an honor to the patron, is proved by the occasional naming of the freedman after a friend of the master,[2] and further by the usual naming of naturalized citizens after the person through whose influence the franchise was bestowed.[3] Probably the motive was often mere convenience. Sometimes a freedman derived his *gentilicium* from the *cognomen* of the emancipator.[4] On such caprice no legal right could be founded. As to clients who were not freedmen, only one example is cited to prove that they bore their patron's name: Livy[5] and Dionysius[6] mention a M. Claudius who was client of Appius Claudius the decemvir. But Marcus may have been a freedman of Appius, or he may have been a plebeian Claudius who in some way had come into clientage; and there is strong evidence that as a rule ordinary clients did not have the name of their patron. Salonius was a client of the elder Cato.[7] C. Cicereius was a client, perhaps a freedman, of Cn. Scipio.[8] Mallius Glaucia, a freedman, was a client of T. Roscius.[9] Here is an example of even a freedman who did not bear the patron's name. Mucius was a client of Ti. Gracchus.[10] Licinius was a client of Catulus.[11] Marius was a client of Herennius.[12] Satrius Secundus and Pinarius Natta were clients of Sejanus.[13] Publius Egnatius was a client of Soranus.[14] Although in some of these

[1] *Cf.* page 664 *supra*.

[2] *Cf.* Egbert, Latin Inscriptions, p. 100; Cagnat, Cours d'epigraphie latine, pp. 80 *et seq.*; Michel, Du droit de cité rom. pp. 306 *et seq.*

[3] Egbert, *op. cit.* p. 102; Cagnat, *op. cit.* p. 75; Mommsen, Röm. Staatsr. p. 64, n. 1. It was especially necessary that a foreigner on becoming a citizen should receive a Roman name.

[4] Cagnat, *op. cit.* p. 80.

[5] III, 44, 5.

[6] XI, 28.

[7] Gell. xiii, 20, 8; Plut. Cat. Mai. 24; Pliny, N. H. vii, 14, 61.

[8] Val. Max. iv, 5, 3.

[9] Cic. Pro Roscio Amerino, 7, 19.

[10] Plut. Tiberius Gracchus, 13.

[11] Cic. Orat. iii, 60, 225.

[12] Plut. Mar. 5.

[13] Tacitus, Annales, iv, 34.

[14] *Ibid.* xvi, 32.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

cases the word client may be employed in the loose sense of dependent, in others the use is certainly technical. To prove that these instances are not exceptional it may be well to mention two others of a more general nature. When Varro[1] asserts that the Aemilii were descendants of Aemilius, he certainly excludes the clients from the use of the Aemilian name, for no Roman could think of clients as related to their patron in blood and descent; and when various Roman writers[2] speak of the three hundred and six Fabii with their five thousand clients, they certainly give us to understand that the clients were not themselves Fabii. It is a pertinent fact that when a conquered people became clients of the conquering general they did not take his name or enter his *gens*. If, too, clients usually received the name of their patron and entered his *gens*, the patrician gentile names would in historical time be far more widespread than we find them; all or nearly all patrician *gentes* would have many plebeian branches, and the plebeian members of a *gens* would greatly outnumber the patrician members.[3] We may conclude that as a rule clients did not bear the *gentilicium* of their patron, and therefore could not according to Scaevola's definition be counted among his *gentiles*.

It might be urged with a faint appearance of reason that if the clients took part in the religious rites of the *gens*, they were in a degree members of that association.[4] The first source usually cited to prove this participation is Dion. Hal. ii, 10, 2:

Τοὺς δὲ πελάτας ἐδει τοῖς ἑαυτῶν προστάταις . . . ἔν τε ἀρχαῖς καὶ γηροφορίαις καὶ ταῖς ἄλλαις ταῖς εἰς τὰ κοινὰ δαπάναις τῶν ἀναλωμάτων ὡς τοὺς γένει προσήκοντας μετέχειν.

In the expenses of holding offices and of performing public duties and in other outlays for the public good it is necessary for the clients to share with their patron, just as do kinsmen.

It is clear, however, that this passage refers to the patron's expenses in public life and not to the expenses of the *gens*. No

[1] L. L. viii, 4, quoted p. 664, n. 3.

[2] *Cf.* Fest. 334, 6.

[3] On the comparatively great number of clients, see Premerstein, in Pauly-Wissowa, Real-Encycl. IV, 36 *et seq.*

[4] *Cf.* Mommsen, Röm. Forsch. I, pp. 371 *et seq.*; Bloch, Orig. du sén. rom., p. 107; Voigt, in Ber. sächs. Gesellsch. d. Wiss. XXX (1878), p. 163; Premerstein, *op. cit.* p. 37.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

mention in fact is made of the *gens*; for the expression τοὺς γένει προσήκοντας, as all Greek scholars know, means simply "kinsmen."[1] If it should be granted that γένει here signifies *gens*, making the phrase equivalent to "those belonging to the *gens*," it would certainly exclude the clients from the *gens*, for the passage contrasts τοὺς πελάτας with τοὺς γένει προσήκοντας. In any case no reference is made to gentile *sacra*.

Dionysius[2] tells us that the Fabii with a few clients went forth to perform the religious rites of their *gens*. In this case the clients may have accompanied their patrons to help protect them from the Etruscans or merely as servants. At all events there is no intimation of their sharing in the *sacra*. Elsewhere Dionysius states that it was as descendants of the common ancestor of the *gens*, hence as blood kinsmen, that the members of the association joined in common offerings to the gods and in honor and love to the spirits of the forefathers.[3] This principle would exclude clients as well as all others of alien blood. If a patron took some of his dependents with him as servants to the gentile festival, and even if they chanced to receive food from the festive table, these circumstances would not make them members of the *gens*.[4] In fact Dionysius expressly excludes the clients from any share in the *gens*.[5]

The case of Hispala Fecenia, a freedwoman, is often used to prove that women of her class belonged to the *gens* of her patron, and could not marry outside of that *gens* without especial

[1] Members of the *gens* would be τοὺς μετέχοντας τοῦ γένους.

[2] IX, 19, 1.

[3] XI, 14. On this principle Fustel de Coulanges, Ancient City, pp. 131 *et seq.*, bases his treatment of the *gens*.

[4] In like manner it has been assumed (*cf.* Marquardt, Privatleben der Römer, p. 353) that a freedman had a right to interment in his patron's—that is, in the gentile—tomb. The truth is that the tomb belonged to the family rather than to the *gens* (p. 678), and the citations furnished by Marquardt, *ibid.*, prove that interment in the family tomb was not a legal right of a freedman, as it depended wholly on the will of the patron, and that it did not indicate gentile connection, but was only a kindness sometimes shown to mere friends; *cf.* Cic. Pro Archia, 9, 22; Scholia Bobiensia, 358.

[5] In ix, 15, 2, he contrasts τοὺς μετέχοντας τοῦ σφετέρου γένους—"those who shared in their *gens*"—with the clients and friends who were to be conducted in addition on the proposed military campaign.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

permission,[1] the purpose of the law being, as is alleged, to retain them and their children in dependence on the *gens*. As her patron had died, evidently without agnatic descendants, she was under no one's *manus*[2]—free to all appearance from the *gens* of her patron. Under these circumstances the praetor at her request appointed a guardian for her, and she made a will in which she bequeathed all her property to a friend.[3] Afterward in return for information given the state a plebiscite granted her the right to alienate her property, to marry outside her *gens—gentis enuptio*—and to choose a guardian, just as though she had been permitted by the testament of a husband.[4] From these statements it appears that without this special enactment the various privileges mentioned would have been at the disposal of her husband, if she had one;[5] or if not, of the praetor and the guardian whom he appointed. No reference is made to her being in the power of her patron's *gentiles*.[6] The *gens* referred to could not be that of her patron, from which Scaevola's definition excluded her; but the state, looking upon her as a free woman legally qualified to marry,[7] necessarily assumed that she, like every free person, had a *gens* of her own, consisting of whatever kin she may have possessed, one of whom could have claimed the right to guardianship over her;[8] in other words, *libertini* had potential *gentilitas* with one another though not with their patrons.

Lastly the clients are often contrasted with the *gens* and its members. Livy[9] mentions C. Claudius with his *gentiles* and his clients. Dionysius[10] states that two Fabii, after consulting with the members of their *gens*, promised the Senate that they would themselves voluntarily undergo a specified danger, taking with them their own clients and friends. He also tells us that

[1] *Cf.* Premerstein, in Pauly-Wissowa, Real-Encycl. IV, 43.

[2] Livy xxxix, 9, 7.

[3] *Ibid.*

[4] *Ibid.* 19, 5.

[5] *Cf.* Gaius i, 150.

[6] The Twelve Tables granted the guardianship of a freedwoman to the patron's children, not expressly but by implication; Gaius i, 164 a. It gave no power to the other agnates of the patron, not to speak of his *gentiles; cf.* iii, 48.

[7] Livy, *ibid.*

[8] Gaius i, 155, 157.

[9] III, 58, 1.

[10] IX, 15, 2.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

the Fabii with a few clients went forth to their *sacra*.[1] Festus[2] mentions the three hundred and six Fabii and their five thousand clients. Suetonius[3] speaks of the migration of the Claudian *gens* with a great band of clients. In all these instances a clear line of distinction is drawn between the *gens* or *gentiles* and the clients.

III. *The question of organization*

As long as the *gens* continued to be a mere family in the Roman sense, it necessarily had the organization of that society and was ruled by the *pater familias*. Several patrician *gentes* did not progress beyond this stage.[4] In every such case, however, it was not as a *gens* but as a family that the association was organized and governed. There must have been many an instance, too, of the dwindling of a *gens* to a single individual before its complete extinction, in which case it would be absurd to speak of organization or government. A more difficult problem is that of the *gens* composed of two or more families. Had conditions favored, the authority of the father over his descendants might have developed into an authority of the elder over his younger brother; and in that case the *gens* would have inherited a government from the family. But in fact the law declared the brothers equally free on the death of the father, and required an equal division of the hereditary estate among them, so that every son became the head of an independent family. These *patres familiarum* might have chosen for their *gens* any kind of government on which they could agree. But there is no evidence that they adopted any formal government whatever. The *patres maiorum* and *minorum gentium* were not heads of *gentes* but senators from, or belonging to, the greater and lesser *gentes*.[5] Nowhere in history do the *patres* appear as heads of the *gentes* nor could there always have been just one *pater* to a *gens*.[6] The *gentis princeps*—

[1] IX, 19, 1. [2] 334, 5. [3] Tib. 1. [4] *Cf.* page 683 *infra*.

[5] Cic. Rep. ii, 20, 35; *cf.* POL. SCI. QUART. XXI, p. 518.

[6] From the beginning of the republic it often happened that there were two *patres*, senators, from a *gens*, as is proved by the histories of various *gentes* compiled by Bloch, Orig. du sén. rom. pp. 145 *et seq*. For the two Claudian senators at the time of the decemvirate, see Livy iii, 40, 58.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

ὁ ἡγεμὼν τοῦ γένους—referred to by several writers,[1] was usually the founder of the *gens*. As under the republic *princeps* is never official, the living *princeps* or *principes gentis* could only be the most influential man or men of the association. The chief man might unofficially become the leader of his *gentiles* and their clients on a migration or in any other enterprise.[2]

Gentile asssemblies, cemeteries,[3] *sacra*[4] and customs are occasionally mentioned, but on close examination these institutions often appear to belong to families or groups of families rather than to the *gens*. When a *gens* branched into families, it was a common custom for each family to make for itself a separate cemetery;[5] and probably therefore each had distinct *sacra*.[6] In *gentes* comprising both patricians and plebeians the assemblies, so far as we know, were attended by patricians only,[7] from which we should infer that they were an affair of the family, not of the entire *gens*. The agreement to which the members came was sometimes called *decretum*. Such was the resolution of the patrician Manlii to repudiate the name Marcus.[8] The informal nature of the agreement appears more clearly in the word *consensus*.[9] It could have no legal force, as the *gens* possessed no means of coercing its members; and it applied only to the families who entered into the agreement. The purely moral nature of the obligation is shown by the fact that a member could depart from a traditional custom without consulting his *gens*.[10] The presidency of the assembly is re-

[1] Suet. Tib. 1; Dionysius of Halicarnassus vi, 69, 1; *cf.* Fest. ep. 86.

[2] Suet. Tib. 1; Livy ii, 16, 4.

[3] Cic. De Legibus, ii, 22, 55; Val. Max. ix, 2, 1; Suet. Ner. 50; *cf.* Lécrivain, in Daremberg et Saglio, Dict. II, p. 1505.

[4] Cic. Dom. 13, 35; Har. Resp. 15, 32; Livy v, 52, 3 *et seq.*; Fest. 245, 30; C. I. L. I, 807; XIV, 2387.

[5] Cic. Tusculanae Disputationes, i, 7, 13: "Calatini, Scipionum, Serviliorum, Metellorum sepulchra"; *cf.* Marquardt, Privatl. d. Röm. pp. 14, 353.

[6] *Cf.* Cic. De Officiis, i, 17, 55.

[7] Gell. ix, 2, 11; Fest. ep. 151.

[8] Cic. Phil. i, 13, 32; Livy vi, 20, 14; Fest. ep. 125, 151; Plut. Quaestiones Romanae, 91; Gell. ix, 2, 11.

[9] Suet. Tib. 1.

[10] *Cf.* Cic. Leg. ii, 22, 57.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

ferred to but once; we are informed that the Fabii were convoked by two of their number[1]—a circumstance which would corroborate the view above expressed that the association had no formal head. It can now be seen that a chief would have little to do: for there were no assemblies of the *gens* as such; the supervision of the cemetery and *sacra* fell to the component families; apart from the cemetery the *gens* is not known to have possessed property;[2] and the claim of the *gentiles* to inheritance and tutelage was settled by the courts.

The mutual rights and duties of the members, the peculiar customs of *gentes* and the place of the institution in society and in the state can all be explained without imagining it a corporate or formally organized body. This is true of historical time;[3] and from what is here presented as to the history of the *gens* we may safely infer that it is true of the institution from the very beginning.[4]

IV. *The number of patrician gentes and the average membership*

A passage in Dionysius[5] which to many scholars seems to prove the existence of three hundred patrician *gentes* for early Rome in reality makes no reference to *gentes*. This fact has already been established.[6] Equally unfounded is the notion

[1] Dion. Hal. ix, 15, 2. The consul Fabius spoke to the Senate for the *gens;* Livy ii, 48, 8.

[2] The *Ager Tarquiniorum* was probably the hereditary property of a single family (Livy ii, 5, 2); the *prata Quinctia* (Livy iii, 26, 8) were so called probably because these four *iugera* were supposed to have once belonged to the famous dictator Cincinnatus; and the *prata Mucia* (*ibid.* ii, 13, 5) may owe their name to a similar cause. In modern times places are often named after families without ever having been their property.

[3] Mommsen, Röm. Staatsr. III, pp. 17 *et seq.;* Lécrivain, in Daremberg et Saglio, Dictionnaire des Antiquités grecques et romaines, II, p. 1504.

[4] Mommsen, *op. cit.* thinks it may have had a chief in the past. A corporate character at least for early time is affirmed by Herzog, Geschichte und System der römischen Staatsverfassung, I, p. 11, n. 4; Genz, Patr. Rom, p. 31; Lécrivain, *ibid.* pp. 1510 *et seq.*, and most other modern authorities. Necessarily all who suppose it to have preceded the state must assign to it a corporate character at least for the earliest period of its history.

[5] II, 7, 4. [6] Pol. Sci. Quart. XXI, p. 511.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

that the Romans regarded each of the three hundred senators of the regal period as the *pater* of a *gens*, thus making three hundred in all.[1] As no other evidence has been offered for this number, it cannot be considered even a reasonable theory. Mommsen[2] thought it probable that at the beginning of the republic there were a hundred and thirty-six. According to our sources[3] Valerius at that time added a hundred and sixty-four senators to make up the full number three hundred.[4] If before this *adlectio* there were a hundred and thirty-six senators, and if each *gens* was represented by a single senator, there would have been at the time a hundred and thirty-six *gentes*. Although these numbers may be outright inventions, they probably rest upon evidence known to the ancients. It is not certain, however, that the *gentes* were ever so uniformly represented as Mommsen supposes; in fact so far back as our knowledge reaches, we find *gentes* with more than one senator.[5] If this was the case at the beginning of the republic, there were fewer than a hundred and thirty-six *gentes*.

Scarcely sixty patrician *gentes*,[6] or by the most liberal estimate scarcely seventy,[7] are known to us by name. When we reflect that in an intensely aristocratic state like the early Roman republic few nobles families could have remained in obscurity, we are led to believe that an estimate of about a hundred would be ample. The fewer we assume, the easier it will be to explain the rapid falling off in number during the republic. In spite of the possibility of recruiting the class by the adoption of plebeians, and after 445 B. C. by intermarriage

[1] *Cf. ibid.* p. 500, n. 2.

[2] Röm. Forsch. I, pp. 121 *et seq.*; Röm. Staatsr. III, p. 12, n. 1.

[3] Fest. 254, 24; Plut. Poplicola, 11.

[4] That these new members were plebeian, or if they were, that they remained plebeian after their admission is highly improbable; *cf.* Willems, Sén. de la rép. rom. I, pp. 35 *et seq.*

[5] *Cf.* page 677 *supra*.

[6] Mommsen, Röm. Forsch. I, p. 121; Röm. Staatsr. III, p. 12, n. 1.

[7] Lécrivain, in Daremberg et Saglio, Dict. II, p. 1515, following Willems, adds to Mommsen's list seventeen names, some of them very doubtful; *cf.* Bloch, Orig. du sén. rom. pp. 113 *et seq.*

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

with them, the *gentes* of the patricians vanished one by one in quick succession. Of the thirty-three which, according to Mommsen,[1] disappeared from history before the Licinian-Sextian legislation, six are mentioned neither by the *fasti* nor by the annals;[2] hence they may have become extinct before the beginning of the republic. Fifteen others, vouched for by the annals or the *fasti*, disappeared between the beginning of the republic and the first year of the decemvirate, leaving twelve to disappear between that date and 366 B. C.[3] Thereafter the process continued, with the result that only fourteen are known to have remained at the close of the republic.[4] At a time when patrician nobility was so rare that Julius Cæsar and Octavianus in the interest of religion felt compelled to raise plebeians to that rank, few if any patrician *gentes* could have escaped mention by the extant writers of the period. That their disappearance from history was generally due to extinction is confirmed by the dying out of eight of these fourteen *gentes* before the principate of Claudius.[5]

The rapidity of the process indicates a small average membership of the *gens*. We are astonished therefore to hear of three hundred and six Fabii, all patricians, who went to war against the Etruscans.[6] Schwegler[7] noticed that this *gens* had thus far furnished but three consuls—the brothers Caeso, Quintus and Marcus—who took their turns in holding office, as though there could have been no great number of members to choose from. Even Dionysius[8] wondered how it happened

[1] Röm. Forsch. I, pp. 107 *et seq.*

[2] Their only monuments are the tribes to which they gave their names.

[3] Although computations may vary in detail (*cf.* Lécrivain, *ibid.* p. 1515; Bloch, *ibid.* pp. 113–122), all agree as to the general fact of rapid extinction. Several of the *gentes* mentioned for the early republic may be mythical, in which case a corresponding deduction must be made from our estimate of the number at that time.

[4] Mommsen, Röm. Forsch. I, p. 122; Bloch, Orig. du sén. rom. p. 114. They represented about thirty known families; Mommsen, *op. cit.* When Dionysius, i, 85, 3, evidently following Varro, states that fifty houses (οἶκοι) of Trojan descent survived to his own time, he refers to families rather than to *gentes*, and may include plebeian families, who also claimed descent from the Trojans.

[5] Bloch, *op. cit.* p. 115.

[6] Livy ii, 49, 3; Dion. Hal. ix, 15. [7] Röm. Gesch. II, p. 527. [8] IX, 22, 1.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

that none of these mature Fabii had children. In spite of the statement of Livy that all were patricians, Schwegler[1] believed that most of them were clients. Some explanation of the number is necessary; and it may be found in the statement of Livy[2] that in 358 B. C., in an unsuccessful war conducted by a Fabius against the Etruscans, three hundred and seven Roman prisoners were put to death by the enemy. Probably this fact led some chronicler (Fabius Pictor?) to assert, in behalf of the *gens* to which the defeated commander belonged, that a hundred years earlier a similar number of Fabii had voluntarily met heroic death in war with the same enemy.[3] It appears then that the three hundred and six Fabii of military age are a fiction, and that the *gens* was in fact small.

Evidence that as a rule the *gentes* were small is afforded by a study of the *cognomen*. Although it may be as old as the Latin language, its position after that of the tribe proves that its regular and official use arose after the institution of the Servian tribes[4]—that is, not earlier than the last years of the monarchy or the beginning of the republic; it never became a legal necessity, and in fact several well-known plebeian *gentes* never acquired it.[5] The kings, with the exception of the Tarquinii, whose surnames were doubtless invented in far later time, had no more than two names; and it appears certain that the *cognomina* of the *fasti* in the first century of the republic were

[1] Followed by Bloch, Orig. du sén. rom. pp. 112 *et seq.*

[2] VII, 15.

[3] *Cf.* Pais, Storia di Roma, I, i, p. 517. Much of the material in the history of the fifth century B. C. is drawn from that of the fourth. Since the battle of the Cremera is represented as having been fought about the time of the battle of Thermopylae, the number of Fabii may bear some relation to the number of Spartans; *cf.* Pais, Ancient Legends of Roman History (1905), p. 29. The story, then, may be of composite origin.

No importance attaches to the conjecture of Niese, Grundriss der römischen Geschichte (1906), p. 56, that the two hundred and sixty Tarquinii (Diodorus xvi, 45, 8, or three hundred and fifty-eight according to Livy vii, 19, 2), said to have been put to death by the Romans in the Forum in 351, were not inhabitants of Tarquinii but members of the royal *gens* of that name.

[4] Mommsen, Röm. Forsch. I, pp. 45 *et seq.*; Lécrivain, in Daremberg et Saglio, Dict. II, p. 1510.

[5] Mommsen, Röm. Forsch. I, p. 42.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

inserted at a later revision.[1] The *cognomen* must have remained a second personal name for a long time before it became hereditary,[2] and even then it did not necessarily indicate a branching of the *gens* into families. Only when two or more *cognomina* appear in the same *gens* without being common to all the members, have we clear proof of branching.[3] By such indications no patrician *gens* is known to have divided into families before the fourth century of the city.[4] The *gentes* which became extinct in the early republic must have been small. Of those which survived a considerable number failed to branch. Others, more fortunate in offspring, divided gradually into two, three, or more families. The most widely branched was the Cornelia, which in the fifth century of the city reached its full complement of nine families.[5] The low average appears from the circumstance that the fourteen patrician *gentes* surviving to the time of Cicero comprised about thirty families.[6] At no time, then, were the *gentes* so large as the myth of the Fabii would lead us to suppose; in the first century of the republic and earlier they were as a rule single families, and hence contained few members.

The smallness of the *gens*, to which these considerations point, is further proved by the limited number of *praenomina*. The *gens* Aemilia had eight, the Furia and the Cornelia seven each; the Claudia and the Manlia six each; the Fabia five and

[1] *Ibid.* pp. 47 *et seq.*; Bloch, Orig. du sén. rom., p. 128.

[2] Mommsen, *ibid.* p. 48; Bloch, *ibid.*, pp. 125 *et seq.*, 128; Genz, Patr. Rom, pp. 8 *et seq.*

The theory of Mommsen, *ibid.* pp. 54 *et seq.*, followed by Bloch, *ibid.* pp. 126 *et seq.*, that the *cognomen* was for a long time officially reserved to the patricians seems to be refuted by the considerations here given regarding its late introduction into official documents.

[3] *Cf.* Michel, Du droit de cité rom. pp. 223–226: The entire *gens* could have any number of *cognomina*. All the Furii had two, Medullinus and Fusus; Bloch, *op. cit.*, p. 177.

[4] The Cornelian *gens* was the first to show a branching into families. From the original Maluginenses, the Cossi and then the Scipios separated in the fourth century of the city; Mommsen, *op. cit.* p. 50; Fröhlich, in Pauly-Wissowa, Real-Encycl. IV, 1249.

[5] Bloch, Orig. du sén. rom. pp. 183 *et seq.*

[6] *Cf.* page 681, n. 4 *supra*.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

the Julia four.[1] Within the family the names were as a rule still more restricted. This circumstance shows how few must have been the individuals belonging to any one family; the Cornelii Scipiones, for instance, with their three *praenomina*—Gnaeus, Lucius and Publius—counted on having no more than three sons to any one father. The average number of members prominent enough to find mention in the annals or *fasti* is surprisingly small. Occasionally we hear of two brothers, rarely of three,[2] while uncles and cousins are still more rare.[3] The same result is reached through a consideration of the law of inheritance of the Twelve Tables, which provided that in failure of agnates the *gentiles* should receive the property of a person who died intestate.[4] It implies that at the time of its enactment relationship among all the *gentiles*, though no longer traceable in detail throughout every *gens*, was accepted as a fact; for there is no reason why it should give the property to strangers in blood, and we know that at a later time, after the feeling of kinship had been lost, this provision of the law became obsolete: the praetor found a way of avoiding it in favor of cognates.[5]

The total number of patricians at the end of the regal period must therefore have been small. The custom of calling them together through lictors, who summoned them by name and the name of the father,[6] is further evidence of the fact. It would have been impracticable had the patricians been numbered by thousands rather than by hundreds. This result is confirmed by a circumstance connected with the military system of the time. In the early republic the six centuries of *equites* known as the *sex suffragia* were undoubtedly composed of patricians,[7]

[1] Mommsen, Röm. Forsch. I, pp. 15 *et seq.*; Bloch, *op. cit.* p. 123.

[2] Appius Claudius Caecus had four sons; Drumann-Gröbe, Röm. Gesch. II, p. 140.

[3] These conclusions are drawn from data furnished by Bloch, *op. cit.* pp. 145 *et seq.*

[4] *Cf.* page 667, n. 4 *supra*.

[5] Genz, Patr. Rom, p. 3.

[6] Dion. Hal. ii, 8, 4; *cf.* POL. SCI. QUART. XXI, p. 513.

[7] The *centuria procum* mentioned by Cicero, Orator, 46, 156, is to be identified with the *proceres patricii* referred to by Fest. 249, 1. If in the centuriate *comitia* there was a century of leading patricians, there must have been centuries of ordinary

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

and included about all of that class who were of military age and were qualified for service.[1] On the most liberal interpretation there were no more than about six hundred patricians of military age, and we may assume a half as many older men to fill the Senate, giving an average of no more than nine adult males to the *gens*. The patrician *gentes*, therefore, furnished a sufficiently large nobility for such a city as early Rome, but not enough men to make up the citizenship of a respectable state.

V. History of the gens; its relation to the state

The organization of the primitive Indo-European peoples in families, brotherhoods and tribes[2] allowed no place for the *gens*,[3] which accordingly could not have been a primitive institution. Within the brotherhood degrees of kinship were defi-

patricians, which could only have been the *sex suffragia; cf.* Mommsen, Röm. Staatsr. III, p. 109, n. i. This interpretation is rejected by Holzapfel, in Beiträge zur alten Geschichte, I (1902), pp. 254 *et seq.*, and is supported by Schjott, P. O., Römische Geschichte im Lichte der neuesten Forschungen, in Videnskabs-Selskabets Skriften Hist. Filos. Klasse, II (1906); reviewed by Peter, H., in Berl. Philol. Woch. 1907, 168–70.

[1] Livy iii, 27, 1, speaks exceptionally of a patrician who served on foot because of his poverty.

[2] Schrader, Reallexikon der indogermanischen Altertumskunde (1901), pp. 798 *et seq.* For the South Slavonians, see Krauss, Sitte und Brauch der Südslawen (1885), pp. 15 *et seq.*, 32 *et seq.*, 57 *et seq.* For the Germans, Schrader, *ibid.*; Brunner, Deutsche Rechtsgeschichte, I (1887), pp. 81 *et seq.*, 114 *et seq.* The *propinquitates*, mentioned by Tacitus Germania, 7, 3, were not *gentes*, as Schröder, Deutsche Rechtsgeschichte (1902), p. 16, supposes, but looser groups of near kin. For the primitive Greeks, Schrader, *ibid.* p. 772; Meyer, Geschichte des Altertums, II (1893), pp. 85 *et seq.*; *cf.* Iliad, ii, 362. For the ancient Persians, Geiger, W., Ostiranische Kultur im Altertum (1882), pp. 425 *et seq.* For the Welsh, Schrader, *ibid.* p. 774. For the ancient Hindoos, Schrader, *ibid.* p. 775.

[3] Schrader, *op. cit.* p. 773 *et passim*—*cf.* Sprachvergleichung und Urgeschichte (1890), p. 575—identifies the Roman *gens* with the South Slavonian *bratstvo* and the Greek phratry. His conception of the Roman institution, however, is based partly on the myth of the three hundred and six Fabii (p. 681) and partly on the circumstance that *gens*, like the Greek γένος, has a wider as well as a narrower meaning; it designates not only the widened family but also the folk, state, or nation; see any Latin lexicon, *s. v.* Evidently, too, he has made no thorough examination of the sources, but has relied in the main on modern authorities. The Roman institution which in fact corresponds to the phratry and *bratstvo* is the *curia*, whereas the *gens* corresponds to the Greek γένος, as it appears in the Φιλαίδαι or Ἀλκμεονίδαι. The narrow *gens*, γένος, only is under discussion in this paper.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

nitely recognized through three or four grades of descent.[1] We may grant, too, that in the most primitive times, wherever circumstances favored, ties of kinship extended beyond the limit mentioned, even though they were not designated by name. Conditions favoring this growth were generally settled life and the accumulation of property.[2] A group of kinsfolk larger than the simple family of parents and children, and forming a house-community such as we find among the South Slavonians,[3] Celts,[4] Hindoos[5] and Armenians,[6] Schrader[7] regards as the original of the Indo-European family. Others reduce the importance of the early family, as compared with the phratry, to a minimum.[8] With the settlement of this difficult question the present discussion is not concerned.[9] Whether insignificant or great and powerful, the Indo-European household has always been described as a family, not as a *gens*. In case simple families failed to unite in the house-community or separated from the community but continued in relations of kinship, religion, inheritance and mutual helpfulness, we should not necessarily have the *gens;* for in contrast with the latter the association of near kin here described, so far from being a permanent body, was, with every generation, dropping members and breaking up into new groups, as the recognized or convenient limits of kinship were exceeded. Such was the association of ἀγχιστεῖς in

[1] There were names for father, mother, son, daughter, brother, sister, grandfather and grandson; Schrader, *op. cit.*, p. 213. The existence of the group of four descents, from the great-grandfather to the great-grandson, as an institution among several Indo-European peoples tends to establish its primitive character. There was a name for uncle, but none so far as we know for cousin.

[2] Meyer, *op. cit.* II, pp. 85 *et seq.*, 516; Forschungen zur alten Geschichte, II (1899), p. 517.

[3] Krauss, *op. cit.*, pp. 64 *et seq.*

[4] Maine, Lectures on the Early History of Institutions (1875), pp. 79 *et seq.;* Rhys and Brynmor-Jones, Welsh People (1900), p. 188.

[5] Jolly, J., Recht und Sitte im Grundriss der indo-arischen Philologie, II, p. 76.

[6] Leist, B. W., Alt-arisches Ius Civile, I (1892), p. 497 (quoting Dr. Barchudarian).

[7] Reallex, pp. 218 *et seq.*

[8] *Cf.* Meyer, Gesch. d. Alt. II, p. 87.

[9] On the early family, see Howard, G. E., History of Matrimonial Institutions, I (1904), with the abundant literature cited.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Greece; such on a larger scale was the Welsh *cenedl*,[1] and such must in general have been the group of near kin among the early Indo-Europeans.[2] It had no name, so far as we know,[3] and was not an essential element of the primitive organization.

Early Greek conditions deserve especial attention. In the epic age the κασίγνητοί τε ἕται τε[4] may have included none beyond cousins' children,[5] or ἕται may have applied to the members of the phratry.[6] The patronymic ἀδής meant no more than "son of." Hence there was neither place nor name for a gentile association, wider than the family yet narrower than the phratry; for γένος denoted family, lineage,[7] breed,[8] offspring.[9] It might include ideally all the generations of a family from the founder down to the living representative[10]—merely the germ of the later institution of that name. That the γένος of historical time was of relatively late origin is proved further by the circumstance that in Attic law it had nothing to do with the vendetta, as had the near kin and the phratry,[11] or with inheritance, as had the near kin.[12] In Crete, too, the near kin and the tribe, φυλή,

[1] Seebohm, F., Tribal System in Wales (1895), p. 85; Rhys and Brynmor-Jones, *op. cit.*, p. 194.

[2] *Cf.* Meyer, Gesch. d. Alt. II, pp. 86 *et seq.*; Jenks, E., History of Politics (1900), pp. 19 *et seq.*, 44–61.

[3] The early Indo-European name consisted of an individual name, to which was added as a determinative the name of the father, husband, or master, There might be a second determinative of the locality or community; but no *gentilicium* can be discovered; *cf.* Chase, in Harvard Studies in Classical Philology, VIII (1897), p. 103; Schrader, Reallex. pp. 575 *et seq.*

[4] Il. xvi, 674 *et pass.*

[5] Meyer, *op. cit.* II, p. 85.

[6] The ἕται included relatives by marriage, who stood next to kinsmen in blood; Odyssey, viii, 581 *et seq.*; Iliad, xiii, 463 *et seq.* Doubtless the word applied as well to relatives in blood as far as kinship could be traced; *cf.* Od. iv, 3; Buchholz, Homerische Realien (1873), II, 2, p. 37. Curtius, Griechische Etymologie, II, pp. 254 *et seq.* (English translation, pp. 344 *et seq.*) connects it (*σφε-τα) with ἕταρος, ἑταιρος, in which case it would apply to the members of the phratry, Gortynian ἑταιρεία; Law of Gortyn, x, 38; Schrader, Reallex. p. 772.

[7] Od. vi, 35: xv, 267.

[8] Il. ii, 852.

[9] Il. vi, 180.

[10] Meyer, Gesch. d. Alt. II, p. 86.

[11] De Sanctis, Ἀτθίς (1898), p. 53.

[12] Meyer, *op. cit.*; Hermann-Thalheim, Griechische Rechtsalterthümer, pp. 53 *et seq.*

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

not the γένος, were concerned with the inheritance;[1] and in Sparta the so-called Lycurgic rhetra makes no mention of the γένος among the associations of citizens.[2]

Among the primitive Italians conditions were similar, as may be inferred from the name system. There was at first merely an individual name,[3] to which was added, according to early Indo-European custom, the name of the father, husband or master—for example, Marcus Marci, Caecilia Crassi[4] (*cf.* Ἀχιλλεὺς Πηληιάδης[5]). This is the stage of the simple family and near kin, corresponding to the epic period of Greece. Evidently no further development took place among the Italians till they had differentiated into races—Umbrians, Oscans, Latins, etc.[6]—as is proved by the differences shown by the various dialects in the formation of the gentile name, which was the next to be added.[7] Umbrian differs widely from Latin and Oscan. With regard also to the order in which the elements of the name occur, in the Umbrian and Volscian the gentile name follows that of the father; in the Latin and Oscan it precedes.[8] It is also well established that most of the known *gentilicia* are derived from personal or from family names,[9] and must therefore have been later. In accord with our general result is the fact that the expiatory sacrifice which in early Rome took the

[1] Law of Gortyn, vii, 47 *et seq.* [2] Meyer, *op. cit.*

[3] Lib. Praen. 1: "Varro simplicia in Italia nomina fuisse ait;" *cf.* Appian, Praef. 13. Varro is thinking of Romulus, Remus and Faustulus; but against his view Rhea Silvia, Silvius Numitor and many other mythical names are cited. His statement, however, is corroborated by the appearance of the personal name alone in a Praenestine inscription of the sixth century B. C.; C. I. L. XIV, 4123.

[4] Egbert, Latin Inscriptions, pp. 82 *et seq.*; Cagnat, Cours d'epigraphie latine, p. 37; Mommsen, Röm. Forsch, I, pp. 5-7; Lécrivain, in Daremberg et Saglio, Dict. II, p. 1510.

[5] Il. i, 1.

[6] Undoubtedly this differentiation began in the people of Italian speech before they entered the peninsula; *cf.* Christ, in Sitzungsberichte der königlich bayerische Akademie der Wissenschaften, 1906, p. 244.

[7] Umbrian *-as, -atis*, Picene *-enus*, Oscan *-onius, -aius*, Latin and Faliscan *-eius*; Chase, in Harvard Studies in Class. Philol. VIII, pp. 157 *et seq.*; Meyer, Gesch. d. Alt. II, pp. 516 *et seq.*

[8] Mommsen, Röm. Forsch. I, p. 14.

[9] Chase, *op. cit.* p. 132.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

place of compensation for blood fell not to the *gentiles* but to the *agnati* of the wrong-doer.[1]

The late origin of the *gens* helps explain its late branching, which again is nearly connected with the late closing of the patriciate. Certainly earlier than the closing is the source of the tradition that the patriciate was not an essential qualification for the Senate, the kingship, or the most important priestly offices.[2] According to this tradition the original hundred senators were not patrician,[3] and none of the kings were born in that rank with the possible exception of the last. Romulus and Tatius[4] remained non-patrician, and the idea that Numa, Tarquinius Priscus and Servius Tullius were granted the patriciate has all the appearance of late origin.[5] The tradition is corroborated by the circumstance that the names of most of the kings are decidedly plebeian, not one of them being beyond a doubt patrician.[6] Attus Navius the augur was not patrician;[7] and the non-patrician kings performed officially most important religious functions. These facts do not indicate that the kings and the *sacerdotes* under them were plebeian; they point rather to a condition in which there may well have been nobles and commons, but as yet neither patricians nor plebeians.

[1] Serv. In Vergilii Eclogas, iv, 43; In Vergilii Georgica, iii, 387.

[2] This idea of early conditions could hardly have arisen in or after the period of patrician supremacy.

[3] *Cf.* POL. SCI. QUART. XXI, p. 499.

[4] Livy i, 34, 6.

[5] Nothing is said of the admission of Numa to the patriciate in the detailed narrative of Livy (i, 18), Dionysius (ii, 59), or Plutarch (Numa, 5 *et seq.*). It is only incidentally in speaking of the elevation of Servius Tullius to the patriciate that Dionysius (iv, 3, 4) refers to the elevation of Numa and Tarquinius Priscus. In the latter passage he doubtless follows a different source; *cf.* Bernhöft, Staat und Recht der röm. Königszeit (1882), pp. 139 *et seq.* On the social rank of Tarquinius Priscus and Servius Tullius, see Livy i, 34 *et seq.*, 41, 47; Cic. Rep. ii, 20; Dion. Hal. iii, 41, 4. The last named author alone and inconsistently mentions the elevation of three of the eight royal persons to the patriciate before they came to the throne—evidently adopting a later conception. In the same way Plutarch, Romulus, 28, makes a patrician of Proculus Julius, who could not have been one according to the better tradition; *cf.* Cic. Rep. ii, 10, 20; Livy i, 16, 5; 30, 2.

[6] Jordan, H., Könige im alten Italien (1887), pp. 15 *et seq.*

[7] He was a swineherd; Cic. De Divinatione, i, 17. *Cf.* the stories of divine revelation through plebeians (*e. g.* Livy ii, 36; v, 32), which are incompatible with the patrician claim to a monopoly of religion.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

With the late growth of the patriciate is to be connected the division of various *gentes* into patrician and plebeian branches. This division might be explained by a *transitio ad plebem*, were it not that early conditions afforded no motive for the act. The current view is that the plebeian branches descended from freedmen or other clients—a theory excluded by the demonstration above given[1] that freedmen and clients were not members of their patron's *gens*. A third explanation, proposed by Meyer,[2] seems best to satisfy all conditions and especially to harmonize with the view presented in this paper. In his judgment the *gens* began to separate into families before the closing of the patriciate; one family was made patrician, while another remained plebeian. Developing the results thus far reached, we may reasonably assume a period during which the patriciate was in a state of fluctuation, plebeian families being occasionally admitted and old members falling back into the commons through impoverishment or withdrawal from public affairs. It would agree well with known conditions to suppose further that the patriciate became a closed caste toward the end of the regal period or more probably in the first half century of the republic. It was only after the closing of the nobility that families and *gentes* could be spoken of as essentially and permanently patrician or plebeian. Plebeian *gentes* must have developed almost if not quite as rapidly as patrician; for the Twelve Tables, as has been said, conceive of *gentilitas* as an attribute of citizenship.

The relation of the *gens* to the state may now be easily explained. Doubtless in earliest Rome were families which possessed wealth and reputation inherited from an able or fortunate ancestry, and which were in that sense noble.[3] By acquiring a *gentilicium* and by retaining in perpetuity its agnatic lines of descent, according to the formula above given,[4] such a family became a *gens*. The economic and political growth of the community gradually added new families of wealth and distinction. There was accordingly a continual increase in the

[1] *Cf.* page 672 *supra*.
[2] Gesch. d. Alt. II, pp. 516, 521.
[3] POL. SCI. QUART. XXI, p. 521.
[4] *Cf.* page 665 *supra*.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

number of families whom the king was bound to respect and to associate with himself in the government. As in the simple life of the monarchical period offices and priesthoods were few, many nobles could not be employed in services of the kind, and offices could not be indefinitely increased for the benefit of the growing nobility. The king's council, or Senate, on the other hand, was expansive. The number of members which the antiquarians assume for the beginning of the republic[1] was reached by a gradual growth from a much smaller council in the earliest settlement on the seven hills. Generally in a primitive community we may expect to find the council small, representing the larger component groups rather than the families. We have, too, the authority of Dionysius[2] that the early Roman Senate represented the tribes and the *curiae*. Possibly there was originally a senator for each *curia;* at all events one hundred seems too large for the beginnings of Rome.[3] As the great families, or *gentes*, grew in number and in power, they forced the Senate to admit their leading men, till that body came to represent the *gentes* rather than the tribes and *curiae*. Each important *gens* then had at least one representative in the Senate, while a larger or more influential *gens* might furnish two or more senators. In this way it increased to a hundred and thirty-six members before the beginning of the republic, representing perhaps about a hundred *gentes*.[4] The senators

[1] *Cf.* page 680 *supra*.

[2] II, 12, 2; each tribe chose three senators and each *curia* three. Ch. 47, 1, gives another instance of election by the *curiae*. The censors continued to choose the senators *curiatim;* Fest. 246, 27. In Lacedaemon and in Elis the councillors were elected by the assembly from a few noble families; Arist. Politics, 1306 a. The primitive German council, too, was filled by election (Tac. Germ. 11 *et seq.*) partly at least from noble families (*ibid.* 13). The election of senators was therefore perfectly consistent with primitive conditions. The division of the Roman Senate into decuries seems to indicate a connection with the *curiae;* Dion. Hal. ii, 57, 1; Livy i, 17, 5; *cf.* Bloch, Orig. du sén. rom. pp. 98 *et seq.*

[3] The ancient historians could not know how many senators there were originally; their doubt as to whether the additions were made by fifties or hundreds (*cf.* Dion. Hal. ii, 47, 2) alone proves their lack of reliable information. The Roman colony seems originally to have had a Senate of thirty members, which was afterward usually increased to one hundred; Bloch, *op. cit.*, p. 104.

[4] *Cf.* page 680 *supra*.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

were the *patres* of the community, hence the *gentes* represented were patrician.[1]

In the early years of the republic the patrician *gentes* were at the height of their glory. They monopolized the Senate, the offices and the priesthoods. To secure these advantages to themselves and their descendants forever, they closed their rank to all outsiders and refused to intermarry with plebeians. The people knew, however, that these privileges were a recent usurpation,[2] and the patricians were too few to maintain themselves indefinitely in power. The history of their political decline is well known.

The view of the *gens* and of the patriciate presented in this paper and in the earlier article on the "Social composition of the primitive Roman *populus*," several times mentioned in the course of this discussion, is offered as a substitute for Niebuhr's theory still held by most writers on Roman history. The view here defended accords far better with the sources and with the results of comparative study, and has the advantage of simplicity and intelligibility. The interest of historical science requires us to free our conception of Roman society from that extreme artificiality which Niebuhr foisted upon it, however highly we value his contributions to knowledge; and it is encouraging that good work is being done in this direction by scholars whose opinion commands respect.[3]

GEORGE WILLIS BOTSFORD.

[1] POL. SCI. QUART. XXI, pp. 498 *et seq.*

[2] *Cf.* page 689 *supra*.

[3] Notably Meyer, Gesch. d. Alt. II (1893); Holzapfel, Beitr. zur alt. Gesch. (1902), p. 254; Niese, Grundr. d. röm. Gesch. (1906), p. 37; *cf.* Staaf, E., De origine gentium patriciarum commentatio academica (1896).

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

CURRENT POLITICAL THEORY, HISTORICAL AND SYSTEMATIC

THE last half-decade has brought to light much literary evidence of a lively interest in political theory. Both the history of past systems and phases of thought and the criticism and construction of contemporary systems have received serious attention. Interest in the subject has not been confined to any one particular nation. To the increasing stream of German, French and English works have been added noteworthy contributions from Spain and Italy, and cis-Atlantic thinkers have not failed to manifest a rising interest and influence in the field. Russia also has displayed prodigious activity in political discussion; but objective conditions in the great Slav Empire have not been conducive to scientific calm in this field, and the Russian output, while voluminous, is hardly of a character to figure yet in philosophy.

As between the historical and the constructive method in the treatment of political theory, a tentative generalization would be that the former finds most favor in Great Britain and America, with France perceptibly inclining the same way, while the latter holds sway very pronouncedly in Germany, and clearly but with less exclusiveness in the South European peninsulas. That an exhaustive bibliography of recent publications on political theory would confirm this classification, cannot here be maintained. Much would depend upon where the line should be drawn between purely political theory and theory that is chiefly economic, sociological or juristic. So far as concerns speculation that is chiefly juristic, there is *a priori* ground for the correctness of the tentative generalization: for where the goal has been definitely reached in the progress toward constitutional democracy, as is the case in Great Britain, France and the United States, reflection on what is gives way naturally to reflection on how it came to be so; while among peoples whose constitutional problems are still in a considerable degree unsettled, discussion will turn on those questions of sovereignty, rights and ideal organization which are the core of systematic political theory.

In a group of eight works now before me, bearing dates from 1904 to 1907, the national tendencies above suggested are rather strikingly illustrated. Of the eight works, four are historical and four are systematic. Of the first four, two by Frenchmen and one by an English-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

man are purely historical, while the other, by an Italian, though primarily concerned with a historical theme, is obviously colored by a dogmatic purpose. The second four, all in German, are all systematic discussions of specific dogmas on the borderland of jurisprudence and politics. A somewhat extended examination of these eight works may throw useful light on the trend of current thought.

I. *The Historical Group.*

The most comprehensive subject in this field is that selected by Frédéric Atger, in his *Essai sur l'histoire des doctrines du contrat social* (Paris, Alcan, 1906; 432 pp.). It is somewhat strange that such a monograph as this has not earlier appeared. The contract theory in politics had so distinguished a career, and that career has so long seemed unmistakably a thing of the past, that a scientific obituary has been an obvious necessity. Yet so far as I am aware, D. G. Ritchie's slight but excellent article in this QUARTERLY (volume vi, pp. 656 *et seq.*, December, 1891) is the most elaborate treatment that the subject has received. Dr. Atger's volume fills the gap completely and well. The author knows the general history of political theory, he justly appreciates the relation between theories and objective political conditions, and thus equipped he traces all the forms and variations of the contract theory from its earliest suggestion in antiquity to the last feeble flicker of its life in recent years.

There is much, however, in Dr. Atger's work to justify a feeling that his treatment is not the most satisfactory possible. His praiseworthy purpose to show exhaustively the effect of practical politics on the evolution of theory leads him at times to run far afield and present general political history rather than a history of theory. That his general history is on the whole scholarly and sound is a palliation but hardly a complete justification of his method. In his account of classical antiquity he manages to fill some twenty pages with a discussion of the social contract, though he clearly states the sum total of texts in literature that can by the most liberal interpretation be made to bear directly upon the subject: "a few lines of Epicurus on justice . . . ; a definition of law by Demosthenes . . . ; a passage of Cicero and a paragraph of the *Digest* relative to the legislative power of the prince; and a few lines of St. Augustine." It is a heroic task to derive from these the conclusion that a definite conception of the social contract had actual lodgment in any human mind prior to what we call the middle age. But there is, on the other hand, abundant ground for tracing the curious way in which certain of these texts became by manipulation the leading elements in the development of the contractual dogma.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Dr. Atger's summary of the influences that worked to shape the political theory of the middle age is admirable. St. Augustine, Justinian and Aristotle receive proper credit for the decisive part which they played in the matter. In the account of the law of nature, the state of nature and other ideas closely associated with that of the social contract, one misses reference to the influence of Seneca. There is no possible doubt that the vogue of this philosopher, especially in the later middle age, was of very great significance, and it is disappointing not to find him noticed in Dr. Atger's pages.

The sixteenth and seventeenth centuries were the period of full development of the contractual theory, and these Dr. Atger handles with eminent good judgment so far as his philosophic theme is concerned. His text is marred, however, by a number of distressing errors, of either information or proof-reading. The New England Puritans, whose part in the development of the social contract theory receives full justice, are said to have included "Sir R. William Cotton et Hooker, l' auteur de l' 'Ecclesiastical Policy' [*sic*]." The blending of Roger Williams and John Cotton into a single personality, equipped with the dignity of knighthood, is worthy of Alice in the deepest recesses of Wonderland; and the confusion of Thomas Hooker, the founder of Connecticut, with Richard the "judicious" fittingly rounds out the least fortunate sentence in Atger's work. It is exasperating also to find Grotius's great treatise systematically cited as *De Jure Pacis et Belli*, when *Belli ac Pacis* is just as simple and is moreover accurate. The *Leviathan* of Hobbes, that monument of English literature, written in the vernacular for the express purpose of moulding public opinion, is said by Atger to have been written only in Latin lest it should be too much read and should stir up disorders! And finally, the author's paragraph dealing with the American revolution (p. 230) betrays an astonishing mix-up of the Declaration of Independence, the Articles of Confederation and the Constitution of 1787. "En 1787," he says, "la Déclaration des U. S. d'Amérique est votée par la Convention de Philadelphie." It is impossible from the context to guess whether the error here lies in the date or the "Déclaration."

To compensate for these unpleasant defects we have a great mass of sound and suggestive matter, with passages here and there of brilliant inspiration. In guiding his narrative by the distinction between the idea of a *pactum societatis* and that of a *pactum subjectionis*, Dr. Atger is on firm ground. If, as he believes, any well-defined concept of contract existed in the thought of antiquity, it was, as he suggestively points out, the concept of a contract that made social life possible

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

rather than of one that bound subjects to a monarch. The latter species the author regards as a product of mediæval thought, and he admirably traces its development out of the various political and intellectual influences which contributed to its growth.

With Hobbes begins the exact theoretical formulation of the social contract proper, which finds its climax in the speculation of Rousseau. Though Dr. Atger deplores, in his introduction, the erroneous custom of treating Rousseau as the chief representative of the contract theory, one-eighth of the text is devoted to this single philosopher. He is warmly defended from the men of letters and the jurists who have respectively found his philosophy shallow and illogical. Dr. Atger believes that Rousseau has failed of appreciation through the failure of his critics to study his philosophy as a whole. Behind the purely political dogmas of the *Contrat Social* lies, according to Dr. Atger, a broad social philosophy. The elements of this Rousseau found to his hand in the writings of the contemporaries who made the eighteenth century famous. Rather surprisingly, but on the whole with much truth, the most characteristic quality in Rousseau is declared to be his profound religious sentiment; exhibited, however, not in a theological system, but in an "élan vers Dieu."

"C'est le sentiment piétiste . . . qui est le fil conducteur de tout le système. Rousseau débute par une critique de la civilisation que ne désavouerait pas Saint-Augustin, et il finit par la constitution d'une religion civile dont le dogmatisme autoritaire ne répugnerait pas a Calvin." (p. 255.)

Another excellent passage (p. 304), too long for quotation, embodies a striking comparison and contrast of Rousseau and the Physiocrats. A single sentence may illustrate the spirit of this judgment: "Pour Rousseau la société actuelle est une perversion des lois naturelles, pour les Physiocrates c'en est la corollaire." The development of this idea and the application of it to the analysis of intellectual currents in the time of the French Revolution furnish the climax of Dr. Atger's work. His view of the relation of the contract theory proper to the French Revolution is very unusual and equally just. It is commonly assumed that the course of the revolutionists was closely conformed to the requirements of Rousseau's dogmas. In truth, as the author concisely puts it, the epoch presents "a very great wealth of practical views, a singular poverty of doctrine" (p. 328). Men were too seriously occupied to take time for philosophic speculation. The only French thinker of the Revolution time who is considered worthy of notice is, oddly enough, Babœuf, whose views are rather fully described—"a blend of

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Morelly and Rousseau." The legitimate philosophical succession to Rousseau in respect to the social contract Atger properly finds in the Germans, Kant and Fichte, who, like Babœuf, illustrate the curious development of the extreme individualism with which the social contract idea was primarily bound up into the strict "statism" (*étatisme sévère*) that was illustrated by the theories of the German philosophers and the practice of Napoleon.

In the nineteenth century the social contract becomes a vague and tenuous dogma, and Dr. Atger's account of it fails correspondingly of coherence and interest. Only French philosophy is considered, and the narrative ends with a description of the views of Renouvier and Léon Bourgeois. That the social contract has lost all vitality is sufficiently indicated by Bourgeois' doctrine that it must be regarded as a "quasi-contract"—that ingenious category to which lawyers assign concepts that lack the substance of which they must for some reason retain the name. Despite the result which his record shows, Dr. Atger concludes his work with an expression of the conviction that the idea of social contract "has not said its last word"; but he modestly and wisely declares that his true rôle is that of historian, not of advocate.

The little volume of Professor Giorgio del Vecchio, *Su la teoria del Contratto Sociale* (Bologna, Zanichelli, 1906; 118 pp.) has for its theme a single feature of the history which Dr. Atger treats at length. What was the relation, if any, of Rousseau's *Contrat Social* to the famous Declaration of the Rights of Man formulated by the French Revolutionists in 1789? Jellinek and many other students of theory have found the most perfect logical antithesis between Rousseau's conception of sovereignty and the doctrine of absolute rights possessed by the individual. Del Vecchio vehemently denies that there is any incompatibility between the two ideas, and, in order to establish his position, seeks at some length to determine the exact character of the social contract as conceived by Rousseau.

Like Atger, del Vecchio insists that Rousseau cannot be understood without considering his works as a whole. Such consideration shows that his philosophy is idealistic, and that the social contract is conceived not as historical reality, determining actual political life, but as a rational principle explaining ideal society. It is by his consistent adhesion to this point of view that Rousseau is preëminent among philosophers of the contract school. Del Vecchio slays the thrice slain by showing the philosophical vices of Grotius' contract theory. The chief trouble with the Dutch thinker was, according to the author, that he treated the social contract as an historical and empirical fact. Hobbes

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

began differently, treating the contract as a purely rational conception, but eventually, in his desire to justify existing absolutism, ran off into the same error that vitiated Grotius. Locke, on the contrary, began wrong, regarding the contract as a fact, but came round to treat it as purely rational. Rousseau alone started right and stayed so throughout his system.

This summary review and comparison of the leading theories is clever if not quite convincing. It gives del Vecchio the basis for his contention that Jellinek's criticism of Rousseau is entirely unfounded. In the earlier part of the *Contrat Social* Rousseau does indeed declare in unqualified terms that the individual gives himself up with all his rights to the community, and that the state or sovereign thus created is absolute. But, del Vecchio maintains, in view of the philosopher's positive assertion of individual liberty and equality elsewhere in his works, and in view of the purely intellectual purpose of the *Contrat Social*, this renunciation of individual rights must be regarded as only fictitious (*un atto fittizio*) or constructive (*un canone costruttivo*), designed to show how the rights of the individual, while inherent in and inseparable from him (*inscindibili*) by their nature, must be in form conferred upon him by the state. In other words, Rousseau assumes and maintains always that liberty and the rights in which it consists are inalienable and indispensable attributes of human nature, and he employs the formula of a contract of alienation only for the purpose of showing how these inalienable rights pass from the natural to the civil order; they are as real and inalienable after as before the contract through which sovereignty comes into existence.

Such is the ground on which del Vecchio accuses Jellinek of error in asserting that the Declaration of the Rights of Man is irreconcilable with Rousseau's political theory, and that the *volonté générale*, the sovereign, is juristically unlimited. Rousseau, del Vecchio holds, is not an absolutist and does not deny to the individual all rights as against the state. His theory is based upon the idea that the rights of the individual are as indispensable an element in the concept state as is the power of the sovereign. Juristically the rights of the individual do not limit the state; but through the fact that individual rights are an essential element of the state, certain organs of the state are limited by other organs. There is really no such antithesis as that of individual *versus* the state. What is in the mind of those who use the familiar phrase is the check and balance of organ against organ through which are maintained the rights that are an essential part of the political order.

Such a general conception of the relation of rights and sovereignty is

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

interesting, and is based on doctrines which will be discussed later in this paper. But that Professor del Vecchio is able to find this view in Rousseau is to me an astonishing thing. The *Contrat Social* asserts, categorically and with elaboration, that the sovereign general will is inalienable, indivisible and infallible, and explains that while there are limits involved in its very nature, the extent of those limits is determined exclusively by itself. Here are Rousseau's words: "On convient que tout ce que chacun aliène, par le pacte social, de sa puissance, de ses biens, de sa liberté, c'est seulement la partie de tout cela dont l'usage importe à la communauté; mais il faut convenir aussi que le souverain seul est juge de cette importance."[1] If that does not mean juristic absolutism, nothing can.

The crux of the whole matter is a flat self-contradiction in Rousseau's work. Compare with the foregoing quotation the following:

"Ces clauses [du contrat social], bien entendues, se réduisent toutes à une seule: savoir, l'aliénation totale de chaque associé avec tous ses droits a toute la communauté. . . .

". . . l'aliénation se faisant sans réserve, l'union est aussi parfaite qu'elle peut être. . . ."[2]

A philosophical system which requires at the very outset a reconciliation of those two quotations seems after all hardly worth taking seriously. If, however, it must be reckoned with, it is Jellinek's rather than del Vecchio's interpretation that is to be followed.

The remaining two works of the historical group under consideration both deal with the political theory of John Locke. One is a sketch by Sir Frederick Pollock of *Locke's Theory of the State*, reprinted from the *Proceedings of the British Academy* (1904). The paper is in the author's familiar manner—clear, well-informed, accurate and judicial. The scope of the essay is too contracted, however, for the development of anything that is new; yet the wealth of Sir Frederick Pollock's attainments in the history and substance of law enables him to vary his discussion of Locke with many brilliant flashes of juristic suggestion.

The volume by Charles Bastide entitled *John Locke: ses théories politiques et leur influence en Angleterre* (Paris, Leroux, 1907; 397 pp.), possesses the exhaustiveness and solidity of a doctoral dissertation of the best type. No significant incident of Locke's life escapes mention, no phase of his thought is omitted from consideration. The political and intellectual environment of the philosopher is minutely investigated in the original sources. What he owed (and it was very much) to

[1] Contrat Social, ii, 4.

[2] Contrat Social, i, 6.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Shaftesbury, what he contributed to and received from the deadly strife of Whigs and Tories and his relations and influence with the French Protestant exiles in Holland and England—all these matters are set in a clear light. There is rather more of general history than of Locke proper in the work; and of his political philosophy the theory of religious toleration bulks rather larger in M. Bastide's vision than the theory of the state.

To English and American students Locke's doctrines concerning state and government have always seemed the most important and influential parts of his speculation. It was these that had so immediate and conspicuous a relation to the revolutionary movements in Ireland and America. As M. Bastide shows, Molyneux's *Case of Ireland*, the textbook of the eighteenth-century movement for Irish parliamentary independence, was written by a friend of Locke at Locke's suggestion, and in many parts followed the argument and the very language of the *Treatises on Government*, while the dependence of American thinkers of the revolutionary epoch on Locke is notorious. Under such circumstances it is interesting to note the weight attached by M. Bastide to the other aspect of the philosopher's work. The reason for our author's leaning is doubtless to be found in the Frenchman's natural preoccupation with the revocation of the Edict of Nantes, by which Louis XIV precipitated upon Europe the whole question of religious toleration. M. Bastide's account of the relation of Locke and his thought to this episode and to the conflicting doctrines in the famous controversy between Bayle and Jurieu, constitutes one of the best chapters in the volume.

At a single point the author's comprehensive list of the systems which greatly influenced Locke seems defective. No mention is made of Pufendorf as of any significance in this respect. Yet before Locke wrote his *Treatises on Government* the German philosopher had attained great distinction by his works on political science, and the striking correspondence between the views of the two writers on certain important points of theory, notably the state of nature and the contract by which its evils are escaped, forcibly suggests that the Englishman profited by the speculation of his predecessor.

M. Bastide's work ends with an interesting account of Locke's influence in the eighteenth century. The general conclusion derived from this survey is that the defense of tolerance was the only leading feature of his philosophy that obtained permanent and general acceptance.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

II. *The Systematic Group.*

While the historical works which we have considered all deal chiefly with phases of the contract theory of state and government, the four systematic works before us all have for their chief theme questions whose character and importance have been largely determined by the definitive abandonment of the contract theory. In the middle of the nineteenth century, with the work of Gerber, the scientific discussion of public law in Germany assumed the general character which it has today. The concepts state, sovereign, constitution, law and rights were released from their long subjection to the dogmas of natural law and social contract. But while there was a general uniformity in relinquishing the old dogmas, the jurists manifested much diversity in the new doctrines which were brought forth. The Bismarckian era was as prolific in intellectual as in physical warfare. It is said that the Iron Chancellor expressed particular satisfaction with the constitution of the new German Empire because its provisions could not be explained by any of the current scientific theories about state and government. The great statesman's cynical joy has been well justified by the controversy and confusion that have pervaded the ranks of commentators on the constitution. All the political science of the continent has been affected and largely determined by the struggles over the interpretation of the system which consolidated German national unity.

The four treatises before us agree in a conscious purpose to react against the subjection of political science to the party politics of Germany. Each author expresses a conviction that jurists must rescue public law from its unhappy servitude to party aims and place it again on the serene level of pure rationalism. Various aspects of ultimate political and juristic science are employed by the different authors as the central themes of discussion, but in all the works alike a very significant part is played by the definition and interrelationship of the concepts sovereignty and rights. The doctrines set forth on these topics are easily first in the interest of an American reader, and from them may be derived a most satisfactory idea of the trend of German political science.

That law and rights are created, guaranteed and abolished only by the state, in its sovereign character, is a proposition that English and American jurists commonly consider an undebatable postulate of public law and political science. The individual may enjoy an extensive field of liberty, but the rights which make it up are rights only because and so long as they are said to be so by the supreme law-making organ of

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

the state. They may be carefully protected against violation by the government, but against the state itself there is no protection whatever.

This idea of the relation of the state and sovereign to law and rights, though well adapted to the solution of many of the most pressing problems of public law and political science, German and Germanistic jurists can bring themselves to accept, if at all, only with great difficulty and with many reserves. For reasons which are not hard for the student of history to understand, the ascription of absolute power over individual rights to the state suggests the outworn system of monarchy. *Staat* connotes princely will and *Recht* connotes juristic reason, and the subordination of reason to will, under such circumstances, is resented. Hence the struggles which appear in the works before us to assure to *Recht* and *Rechte* a parity with *Staat* and *Souveränetät*.

Professor Jellinek, of Heidelberg, is one of those who have gone farthest toward accepting the theory of the state as sovereign. The state to which he ascribes juristic absolutism is the national state—a people (*Volk*) occupying a definite territory and possessing an organized government (*Obrigkeit*). But complete as is the supremacy of the sovereign state, there is room logically for the conception of rights in the individual which the state is bound to respect. Jellinek's exposition of those rights is embodied in his *System der subjektiven öffentlichen Rechte*, of which the second edition, revised and enlarged, is before me (Tübingen, Mohr, 1905; 366 pp.). His fundamental dogma is substantially this, that the state is, from the legal point of view, bound by its own laws. Morally and politically the sovereign state may be conceived to be absolute; juristically it must be regarded as subject to the constitutional system (*Rechtsordnung*) which it has itself created. Whatever privileges are ascribed to the individual by this system are, therefore, true rights over against the state. In juristic science, according to Jellinek, this involves no contradiction of the idea that the state is sovereign. Legally the state is a person, *i.e.* a *Rechtssubjekt*, an entity having a capacity for rights; the individual is also a person in this sense; and the two are *Rechtsgenossen*, partners in the relationship which is the essence of law and rights (*Recht*). State and individual both have rights over against each other.

This idea Jellinek fortifies and possibly clarifies by refined psychological analysis to illustrate the nature of personality. To one who has ever found satisfaction in the clear-cut definitions and distinctions of Bentham and Austin in the matter of law and rights, the German philosopher is tiresome. There is evidence that he is influenced to elaborate his divergence from them by the difficulty which their doc-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

trines make in the matter of international law. The scandalous proceeding of Austin in excluding this altogether from the category of law and calling it "positive morality" has never ceased to worry the jurists. Jellinek presents as a convincing evidence of the personality of the state the reflection that, if the state is not a person and endowed with a capacity for rights (*Rechtssubjekt*), there can be no such thing as international law (*Völkerrecht*)!

If a reader is able to overcome the annoyance caused by the ascription of rights to the state and to the individual against the state, Jellinek's volume will prove an extremely acute and complete exposition of important phrases of constitutional and administrative law. The subjective public rights which are considered include certain of the ordinary civil and political rights of the individual on the one hand and on the other what he calls the "rights" of the state itself and its organs. His treatise has for its field in this respect public law in the strict sense, with especial reference to Germany.

A particular aspect of the general subject treated by Jellinek is dealt with by Dr. Friedrich Giese in *Die Grundrechte* (Tübingen, Mohr, 1905; 133 pp.). The problem of this monograph—apparently a doctoral dissertation—is to determine whether, in the strict juristic sense, the elements of individual liberty generally recognized in modern times as fundamental are "subjective public rights." The *Grundrechte* include security of person and property, equality before the law, freedom of belief and expression, and the rest of those privileges which had a distinguished history under the name of natural rights. Dr. Giese takes much comfort in trampling on the long defunct theory that these rights are innate or conferred by nature, and maintains that their source is the constitutional system (*Rechtsordnung*) of the state. Moreover, as the constitutional system is a creation of the state, the latter must be regarded as the sole creator and guarantor of individual liberty. The state is sovereign and all-powerful, and it marks out a sphere within which it declares that it will neither itself attack the individual nor permit others to attack him. This is the sphere of fundamental rights.

Whether these are rights proper depends upon the precise definition of that term. Giese, after an examination of the views of eminent jurists, such as Windscheid, Ihering and Jellinek, formulates this rather ponderous but not unscientific definition:

Unter einem subjektiven Recht verstehen wir diejenige Rechtslage, welche von der objektiven Rechtsordnung dadurch geschaffen wird, dass sie im Interesse einer bestimmten Person eine ein Gut derselben schützende

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

und seinen Genuss sichernde Rechtsnorm setzt, sofern sie der so geschützten Person gleichzeitig die ausschliessliche Willensmacht (Befugnis) verleiht, im Falle der Verletzung dieser Rechtsnorm den darin enthaltenen Imperativ aus eigener Initiative auszulösen und dem Verpflichteten gegenüber durchzusetzen [p. 70].

From this it appears that the essentials of right proper (*subjektives Recht*) are these: (1) That the immediate end be the protection of an interest of the individual; (2) that the state has transferred entirely to the individual the function of initiating the process for enforcing the protection; and (3) that there are organs available for the effective realization of the protection. Because his analysis shows that the *Grundrechte* are lacking in the last two of these essentials, Dr. Giese concludes that they do not belong in the class of subjective public rights.

This conclusion seems very technical and very juristic. Of more interest from the point of view of political theory is Dr. Giese's sketch of recent German opinion on the large subject. The list of jurists who, like him, refuse to admit that the individual has rights against the state includes such significant names as those of Laband, Seydel, Bornhak and Otto Mayer; but on the other side are the scarcely less authoritative names of Zoepfl, Rönne, Stengel and Gierke, and it is their theory, Giese admits, that has remained dominant to the present time. To a foreign observer it seems as if the conflicting views might readily be reconciled by the adoption of the distinction between state and government and the recognition of rights in the full sense to the individual as against the government but not as against the state. In the various shadings of theory some of the thinkers of both schools approach this solution; but it cannot be denied that the facts of constitutional and political life in central Europe are still such as to support the idea that the government is the state, and to render unattractive any theory that seems adapted to weaken the guarantees of individual liberty.

Professor Gustav Seidler, of the University of Vienna, feels the same dissatisfaction that is manifested by the other writers whom we are studying, as to the condition of juristic science in reference to the state. In his essay entitled *Das juristische Kriterium des Staates* (Tübingen, Mohr, 1905; vii, 103 pp.) he seeks to develop a clear and precise standard by which the scientific student may distinguish a state from every other species of social organization. The essay is in form a good one—logically and lucidly arranged. Full justice is done to the social processes through which the stage of political organization is reached, and the ultimate test of the quality of "state" is found to be that a community possess "Personal-, Gebiets- und Organhoheit."

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

His definition, developed with such precision that every word illustrates an indispensable element of his thought, is this:

"Der Staat ist diejenige Entwicklungsstufe der sozialen Lebensformen der Menschen auf welcher ein sesshaftes Volk sich als Hoheitssubjekt mit Personal-, Gebiets- und Organhoheit offenbart."

Constitution (*Verfassung oder konstitutive Rechtsordnung*) is the term by which is designated the totality of the legal relations of the state to its elements. It is in the constitution—which includes far more than any of the formal instruments to which the name is commonly applied—that a community reveals itself as state. State and constitution are inseparable in thought. That the state gives itself a constitution is as absurd a proposition as that the constitution makes the state. The state is a product of social evolution and the constitution is the legal order through which the state is revealed. Where this legal order—the constitution—expresses the supremacy (*Hoheit*) of a community in the three characteristic respects, as to persons, territory and constitutive organs, there is a state.

The discussion of these points shows Seidler to belong to that school which refuses to put the state above the law. If he had occasion to discuss the point we should expect to find him ascribing to the individual rights proper as against the state. "Not only is the state," he says, "born with the law and in the law, but it can continue to live only in the law." His special contribution to doctrine on this point is an application of the sociological considerations which he regards as so weighty to the explanation of the concept *Rechtssubjekt*. What brings the state within this category is the fact of a social will; and the social will Seidler finds to be a product of that "reciprocal psychic influence of individuals" which is the *deus ex machina* of his system. The psychology of *Rechtssubjektivität* is, he thinks, made entirely clear for the first time by his method.

It is distressing to the reader, after following and admiring the development of this analysis, to learn that after all the state is *Rechtssubjekt* in a different sense from that in which other entities have that character. All other entities are under the law, while the state is correlative with the law. Hence, Seidler says, the state is *Rechtssubjekt sui generis*. Why so much pains should be taken to bring the state within this category only to take it practically out again is one of the mysteries that no one can hope to fathom save an adept in German philosophy.

Seidler's general system is much like that of Jellinek, differing chiefly in psychology. He belongs in the numerous class of those who

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

deem it derogatory to the dignity of their character as jurists to concede that the state is above law, but at the same time hesitate to put law above the state. This latter step, in all its boldness, is taken in the last of the works before us, by Professor H. Krabbe, in his *Lehre der Rechtssouveränetät* (Groningen, J. B. Wolters, 1906; 254 pp.). That the author is located at Groningen, far enough within the Dutch boundary to be secure from the consequences of that *Majestätsbeleidigung* which is so potent an element of administration in neighboring Germany, may or may not account for some features of his philosophy. At all events he gives us a strong and earnest presentation of the dogma that sovereignty cannot be predicated of the state at all but only of the law. The theory that the state is sovereign is merely, he maintains, a survival of the mediæval doctrine of monarchic absolutism. By "state" is really meant one or more determinate human beings; and the ascription to any man of absolute authority over another man is a procedure no more tolerable in modern political theory than practicable in modern political fact. On the basis of this view Professor Krabbe works out at length the amiable, idealistic, preposterous doctrine that law—passionless reason—is the sufficient embodiment of sovereignty.

Aristotle, twenty-three centuries ago, expressed casually his admiration for the idea that law rather than man was the ideal sovereign, but he quickly dropped the subject with the characteristic reflection that in any practical state the law was sure to receive its color and content from the dominant party, and hence to be an agency of conflict rather than order. Professor Krabbe believes, however, that the substitution of an impersonal for a personal authority is a concomitant of growth in civilization and culture and presumes a fully developed capacity for abstract thinking. He will hear nothing of Austin's and Willoughby's doctrine, which, he holds, makes the binding force (*Imperativ*) of a command dependent rather upon the will of the person expressing it than upon its content. No determinate human superior—such is Krabbe's thought—can be presumed capable of amending a constitution which declares itself unamendable; and in this matter it must be admitted that he has the Austinians rather at a disadvantage. But his philosophy rests on a deeper principle than that of constitutional interpretation. In last analysis there is no such conception possible as that of a right to command inhering in any person or persons. "Ein persönliches Befehlsrecht gibt es folglich nicht; nirgends und bei Niemandem ist es zu finden" (p. 150).

Obedience, therefore, is due only to law (*Recht*), which is so defined in terms of purpose (*Zweck*) and utility (*Wert*) as to bring the

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

conclusion that binding force is ascribable to it because it expresses the prevailing consciousness as to what makes for the greatest social advantage. It is an essential element of this theory that law is not "made" by anybody: Topsy-like, it grows; and the function of the persons who constitute the *Rechtsorgane* is merely to indicate their view as to what is law. That this view has not in itself binding force is evident, the author holds, from the way in which so-called legislation is nullified by adverse popular sentiment. But this does not imply that if the people in general assembly should be the organ of so-called law-making or law-discovery, the acts of this body would have *ipso facto* binding force. No more of such an assembly than of any lesser groups of human beings or of any individual is *Befehlsrecht* to be predicated.

The upshot of this theory clearly is that the law embodies the only rules that men are bound to obey, and no one can ever say with authority what the law is. That such a doctrine may have some occasional value in esoteric discussions of private law is conceivable, but in public law it is merely philosophical anarchy. Yet in all the works before us there is discernible some influence of the theory to which Professor Krabbe gives such complete and uncompromising development. Why the keen-minded Germans cling so determinedly to this manner of thought, is a subject for interesting speculation which cannot here be pursued. One influence unquestionably is the extent to which elements of the ancient monarchic absolutism remain imbedded in the constitutional system, imperial and state. Magnifying the rôle of law is a relatively safe and unobtrusive method of protesting against the tendency of court and bureaucracy to magnify the rôle of the monarch. The very significant position of the princes also accounts for some part of the reluctance in Germany to recognize and employ the useful distinction between state and government. The time has not yet come when the prince can be treated exclusively as an element of the *Regierung* and not as an immediate and essential element of the *Staat*.

Our review has revealed in current political theory a conviction that the social contract still signifies something, and a very pronounced adhesion to the kind of thinking which once expressed itself chiefly in discussions of the law of nature. That these relics of the past are sufficiently interesting in this country to warrant their public exhibition is the only justification for this lengthy paper.

WM. A. DUNNING.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

REVIEWS

Studies of Political Thought from Gerson to Grotius, 1414–1625. By JOHN NEVILLE FIGGIS. Cambridge University Press, 1907.—vii, 258 pp.

This is an extremely valuable contribution to historical and political science. The little volume consists of a revision of the Birkbeck lectures delivered by Mr. Figgis at Cambridge in 1900. The original form and character of the material are retained, and the work has therefore the specific quality of lectures: it embodies broad suggestion rather than detailed information; it is philosophical, not descriptive. A deep and accurate scholarship is revealed on every page, and the insight that gives life and usefulness to mere learning is not less conspicuous. It may be guessed without much fear of going wrong that at the university Mr. Figgis's lectures did not attract large audiences. They are not of the stuff that is warranted to make degree-getting easy or to insure culture "while you wait." The author presumes a pretty thorough acquaintance on the part of his readers with the objective history and the intellectual currents of the two centuries with which he is chiefly concerned. Not infrequently his allusiveness is such as to conceal his thought from all but specialists on the period. But to those who have any serious desire to understand the process of transition from the institutions and theories of the middle age to those of modern times, Mr. Figgis's lectures will prove a most suggestive and stimulating guide.

The subjects of the seven lectures which make up the text are, after an introductory review of mediæval thought and method, as follows: "The Conciliar Movement and the Papalist Reaction"; "Luther and Machiavelli"; "The *Politiques* and Religious Toleration"; "The Monarchomachi"; "The Jesuits"; and "The Netherlands Revolt."

The general ideas of the author on the period covered by the volume have been long known to that portion of the public which has been lucky enough to find them in his contributions to the proceedings of sundry learned but obscure societies. It is a great satisfaction to have them more readily accessible. A few quotations will illustrate most effectively the trend of his thought:

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

The real State of the middle ages in the modern sense—if the words are not a paradox—is the Church [p. 16].

The mediæval mind, whether clerical or anti-clerical, envisaged the struggle [between secular and ecclesiastical authority] as one between different officers of the same society, never between two different bodies [p. 49].

It was not monarchy, but efficiency for which Machiavelli cared . . . It may, however, be pointed out that the ideal of efficiency, if it be *exclusive*, will almost invariably tend to become an apology for tyranny, whether that of mob or of monarch. The moment a man . . . sets this or that object as an end in itself, irrespective of the men who are to reach it, he is bound to become impatient of average stupidity, contemptuous of all rules, legal, moral or customary, which delay the accomplishment of his ends [p. 82].

Mr. Figgis, it may be remarked in passing, does not *say* that this last reflection was suggested by the spirit of any prominent contemporary chief of state.

Of the other passages which the reviewer cannot refrain from quoting, the first formulates a conclusion drawn from a very beautiful exposition of the various steps by which the idea and practice of toleration were developed.

Political liberty is the residuary legatee of ecclesiastical animosities [p. 135].

The religious bodies which have done the most to secure "the rights of man" are those two which really cared least about individual liberty and made the largest inroads upon private life wherever they obtained the supremacy—the Roman Catholic Church and the Presbyterian [p. 136].

Our [English] revolution was only the culminating triumph of the Dutch mind . . . It was not the defeat of the Armada but William of Orange who finally conquered Philip II. . . . To estimate our debt to Holland is hard, to overestimate it is harder [p. 197].

These quotations may serve some purpose in indicating the substance of Mr. Figgis's thought. The form of it is harder to indicate or to praise save with heavy qualifications. It seems a pity that his literary revision of the lectures should have left here and there sentences that give a clear meaning but will not parse, and others that easily parse but give no meaning at all. Writers of text-books on rhetoric, seeking for deterrent examples, will greet with joy such expressions as these: "We cannot . . . separate between the principles of Ligueurs and Huguenots" (p. 165); "William the Silent in his apology appeals against Philip II to the fact of his being a sovereign prince, as good as

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

he was" (p. 212). On the other hand, there occur many felicities of phrase, especially in the introductory lecture, which lighten up most attractively a far from frivolous subject. Certain characteristics of mediæval method in philosophy could scarcely be more forcibly suggested than by reference to "the kernel beneath the thick husk of inconclusive ingenuity and illegitimate metaphor" (p. 21). The tale of jocose commentaries on Bluntschli's famous dictum that the state is man, the church, woman, is worthily increased by Figgis's observation that if the German is correct, "we must regard the middle ages as the period *par excellence* of woman's rights" (p. 71). Bodin's grave censure of confiscation as a penalty for treason, on the ground that its frequent application made criminals and bandits of the wealthy people thus suddenly reduced to beggary, elicits the up-to-date comment: "the world had not discovered cheating at bridge as a refuge for the destitute" (p. 127). In applying to a certain familiar type of thought the designation "the oleographic theory of history," Mr. Figgis has done a service to his kind, and his expression will be eagerly appropriated by those who succeed in finding out just what it means.

It may be inferred from the foregoing that the volume is not altogether repellent, despite its subject. The author frankly warns, and wins, readers by a quaint confession and appeal in his introduction. "These lectures may be misleading, but nobody shall call them picturesque. If they guide into a blind alley, it will not be through an excess of 'atmosphere'." And again: "I desire to confess that I have made no conscious effort to be dull. Such confession will not be regarded by all as creditable."

There are very few points on which a critic familiar with the subject would venture to question the accuracy of Mr. Figgis in either his facts or his interpretations. Not everyone would admit that the truth and nothing less or more is to be found in the reference to Hobbes as the philosopher "in whom the meanest of all ethical theories united with unhistorical contempt for religion to justify the most universal of absolutisms" (p. 196). It might be hard to find in the work of Althusius a justification for the assertion that "his state is . . . a fellowship of all the heads of families" (p. 206). Finally there is no doubt at all that Mr. Figgis has inadvertently done serious injustice to the fine literary sense of James Bryce. Twice the latter is said to have characterized Dante's *De Monarchia* as an "epilogue instead of a prophecy." What Bryce actually said was "epitaph"—which makes all the difference between commonplace and inspiration.

WM. A. DUNNING.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

A History of Diplomacy in the International Development of Europe. By DAVID JAYNE HILL. Volume I: *The Struggle for Universal Empire.* Volume II: *The Establishment of Territorial Sovereignty.* New York, Longmans, Green and Company, 1905; 1906.—xxiii, 481; xxv, 663 pp.

The average person who may read these volumes will need to adjust himself to a singular use of the word diplomacy. Yet just what that use is he may not quite see, unless forewarned, until he has gone through the first volume and entered upon the preface of the second. There, finally, he is definitely informed that "the essence of diplomacy does not lie in the character of its organs or its forms of procedure"; that "intrinsically it is an appeal to ideas and principles rather than to force, and may assume a great variety of specific embodiments." Hence it was diplomacy through which the papacy grew so marvellously,

> possessing in itself no material strength, building itself up and acquiring almost universal supremacy by skilfully acting upon the faith, hopes, fears, affections and ideals of mankind; emancipating itself from the Byzantine domination and frustrating the ambitions of the Lombard kings by its alliance with the Franks, reviving the Empire in the West for its own protection, curbing the German emperors by its treaties with the Normans and other powers of Italy . . . balancing and thwarting the forces opposed to its interests by dexterous manipulation until it became the most powerful and widely extended international institution that ever existed.

"Great feats of diplomacy," also, were the winning of "local liberties from the greatest emperors of the Middle Ages" by the Italian cities and the acquiring of "a vast colonial dominion from the spoils of the Eastern Empire" by the Republic of Venice. Without diplomacy "mediæval history would be almost devoid of permanent human interest." In a sense so inclusive and unusual does Mr. Hill here employ the word; of diplomacy so understood has he undertaken a history.

Yet not a history of all such diplomacy; rather is only that large part of it to be treated which has had a rôle in the international development of Europe. Negotiations, treaties, conventions important simply for particular countries are to be left out of view. The aim is to look consistently at events of European significance, and, somewhat as the constitutional historian considers the development of a single state, follow the growth of the political system of Europe as a whole. States are not isolated; they cannot live apart from rivals and enemies and possess no instincts of expansion; they must have relations. In these relations

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

diplomacy becomes a creative agent. Peace and war, defence and aggression, commerce and its protection, and, subsidiary to these, systems of revenue and industry, are all mere elements in the calculations and programme of diplomatic action. Ships are built and manned, frontiers are fortified, and armies are formed and moved in obedience to its theory and practice.

Regard, then, the history of Europe from an international point of view; lay emphasis not upon brilliant campaigns and heroic military achievements, but upon the reasons why battles were fought, the plans and purposes and policies of nations, the use and influence of ideas and principles, in short upon diplomatic policy and activity—so may one come to know with understanding the international Europe of today, to comprehend the diplomacy of modern times. So also may one see better in what measure the historic reasons for armies, navies and fortifications still exist—see better in what measure "to denounce war, to glorify peace, to propose a European federation, and to demand that all international differences be adjusted in an amicable manner."

Holding that the Congress and Peace of Westphalia, while furnishing the international code of Europe, were not the starting-point of European diplomacy, but "were the fruits of a long period of preparation whose movements provide the only key to the meaning of that code," Mr. Hill devotes two volumes—the completed work is to have six—to "indicating the foundations of modern diplomacy" as he sees them in the history of Europe from its organization under the Roman Empire to the official establishment in 1648 of its organization as a system of sovereign states. He surveys the relations of Rome with the barbarians; the rise of the Papacy; the revival of the Empire, together with its fortunes under the Carolingians, and its restoration under the Germans; the conflict of the Empire and the Papacy; the development of diplomacy among the Italian states; the rise of national monarchies; and finally, the period occupied by the struggles of the new states "first for coherence and then for expansion." To these struggles he gives special attention—most, indeed, of the second volume—for "in the relations of France, Spain, Germany and England to Italy and in the growth of the Reformation during the rivalry of Charles V and Francis I were formed the most permanent international traditions of Europe." Italy teaching them, "the national monarchies, after aiming at indefinite expansion . . . finally adjust themselves to a system of balanced and coördinate power based upon the principle of territorial sovereignty."

All this suggests that Mr. Hill—who has long helped to manage our

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

foreign affairs, latterly as our minister at the Hague—would take us over those historical roads by which he has himself sought to know present-day Europe as a diplomatist should know it. Coming down through the successive generations since the time of Rome, what he observes through a diplomatist's eyes he records as part of the history of diplomacy, which makes following him a bit uncomfortable and sometimes too hard, for most of us would have said, rather, such is the general history of Europe as seen by a diplomatist. Nor does Mr. Hill always observe with a glass sufficiently strong and clear. He can refer to the lowest serfs as "vassals"—indeed to the feudal relation as determining, in the middle ages, every man's place in the social hierarchy. He is quite under the spell of the Empire and the Papacy, thinking of history as long confined to their proceedings. He worships frequently at the familiar Teutonic shrine, the Germans being the authors of that localism which was at last to triumph over Romanism. Such marks as these, along with misstatements of detail here and there, bear witness of shortcoming. On the whole, however, his work should prove useful. It represents extraordinarily wide reading in both primary and derived sources; its matter is set forth always conscientiously and often effectively; each chapter is accompanied by a list of references, usually good, spite of serious omissions now and then; and each volume is provided with convenient tables and maps, and an index. It may be read with profit.

EARLE W. DOW.
UNIVERSITY OF MICHIGAN.

American Legislatures and Legislative Methods. By PAUL S. REINSCH. New York, The Century Company, 1907.—x, 337 pp.

This volume is one of the useful American State Series, edited by Professor W. W. Willoughby of Johns Hopkins University. In his preface the author says that his purpose is "to furnish a description of the manner in which law-making bodies—state and federal—in the United States are organized and operated." In accomplishing this purpose Professor Reinsch has produced a work of great value, that marks a distinct advance in scientific treatment of legislative procedure. He has grasped a principle of cardinal importance, oversight of which is a common defect in academic study of political institutions, namely, that the character of institutions is to be found in their working. Description of the form carries one but a little way, and indeed is apt to mislead, for it causes intentions to be considered more than results,

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

and intentions and results are apt to differ greatly. It is a universal principle that consequences are determined by conditions quite irrespective of the motive and purpose with which the conditions are established. Hence it is that history so frequently advises us that great social and political developments take place, not only regardless of the illusions and ideals supplying force for the processes of change, but often in direct opposition to them. That has always been the bane of theoretical schemes of social and political reconstruction.

Professor Reinsch therefore propounds a sound doctrine when he says it "is necessary, in order to secure an adequate understanding" of legislative organs, "to pass beyond a mere examination of their morphology, and to consider the exact manner in which their functional activities are carried on." In pursuing this object he has produced a vivid, suggestive and stimulating work. Seven replete but compact chapters give a good account of procedure in Congress and in the state legislatures. Then comes a chapter on "The Perversion of Legislative Action," in which there is an incisive discussion of the way in which "the institutions and principles of public law have in some instances been effectually superseded by an extra-constitutional system of political influences based on economic or financial power" (p. 228). The subject of constitutional ailments leads on, in the next chapter, to a consideration of the "Public Forces Influencing Legislative Action." Then follows a concluding chapter on "The Legislative Product."

Although full of valuable information the work does not pretend to be anything more than a short study of a great subject. The discussion of legislative functional activities is so distinctly pioneer work that anything like completeness or finality is of course impossible. If opinions are advanced that seem to be merely tentative or conjectural, that is only what is to be expected in consideration of a subject in which there is so much that is obscure. It is a marked achievement to have taken such a strong grasp on a difficult problem and to have aided understanding of it by such penetrating discussion.

Professor Reinsch's remarks on changes that have taken place in the quality of American state legislatures might be taken to imply that there has been some deterioration in American character, so that it does not support institutions of self-government as well as formerly. If we turn to the account of American colonial conditions in chapter xii of volume iii of Lecky's *History of England in the Eighteenth Century*, or if we study the picture which McMaster, in his *History of the People of the United States*, gives of public affairs in the early days of the republic, we shall be impelled on due reflection to conclude that any notion that

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

American institutions have had their golden age is as mythical as notions of that order have been everywhere and always. Candid examination will disclose the fact that our state constitutions have never worked satisfactorily, and that the inherent defects, of which there is now such bitter experience, have always existed, but the consequences have become more voluminous and manifest with the growth of the country and with the increased need of governmental efficiency created by the pressure of social problems.

Besides being questionable as a matter of fact, the idea that there has been some deterioration in American character involves wrong notions of the nature and office of a written constitution. It is queer logic to hold that popular character is at fault if contrivances of government work badly. Are the people made for the use of political institutions or are political institutions made for the use of the people? It would seem to be a principle too obvious to require proof that the mechanism of government should be adjusted to the force which moves it, and yet the reverse proposition is unconsciously assumed in the continual lamentation going on over the inferior personnel of legislative bodies and the low character of persons who make their way to administrative posts. Selection of fit persons for public trusts is the essential object, the reason for being, of every constitution of government, and failure in that is conclusive evidence of something wrong in constitutional arrangements. Such failure does not necessarily prove that the defects are extensive or profound, but it certainly proves that there is a screw loose somewhere.

This was perfectly well understood at the time when the constitution of the United States was framed. John Francis Mercer of Maryland remarked, during the debates in the Convention of 1787:

> It is a great mistake to suppose that the paper we are to propose will govern the United States. It is the men whom it will bring into the government and interest in maintaining it that are to govern them. The paper will only mark out the mode and the form. Men are the substance and must do the business.

Mercer's view showed a right understanding of the nature and office of a written constitution. It was the view prevailing among the Fathers and was the secret of their comparative success in constitution-making. In their day there was much to apprise them that the real constitution of a country is the actual organization of the powers of government, and that a written constitution is important only as it conditions that organization in practice. This is the sense in which the

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

term constitution is used in the *Federalist*, as number 9 alone suffices to prove. The Fathers knew, as Fisher Ames remarked, that "constitutions are but paper; society is the substratum of government."

Paper constitutions, while as useful as paper money, have like it a strong tendency to obscure the actual basis of value. The habit of paper emissions in constitution-making has become so prevalent since the time of the Fathers that illusions have been propagated that are great hindrances to the adoption of sound methods of reform. To go into details would carry this examination beyond the limits of a book review, but at least it may be observed that it is incumbent on every one who discusses constitutional problems to keep in mind what a constitution really is. The true constitution of a country is the actual existing distribution of political power, and it is only as the written constitution affects the distribution of political power that it is operative. By applying this cardinal principle one will have the means of testing the value of any political nostrum that may be offered. It is not the abstract merit of municipal ownership, direct primaries, the initiative, the referendum, the recall *etc.* that counts, but the distribution of power that will ensue in the circumstances of American public life. What sort of men will be interested in working the proposed instrument of government, and what will they be likely to use it for as a general thing? The answer to that sums up its constitutional value.

HENRY JONES FORD.

PHILADELPHIA, PA.

The Federal Power over Carriers and Corporations. By E. PARMALEE PRENTICE. New York, The Macmillan Company, 1907. —xi, 244 pp.

A critical journal has described the reasoning of Mr. Prentice as similar to certain of the now discredited arguments of ante-bellum days. Such criticism supplies its own conclusive rejoinder, for those heterodox doctrines could be disposed of not in argument but only in conflict. Their logical correctness was not affected by that result, as is shown by the serious consideration even now given to the proposition that Lee was no more a traitor than was Washington. It may be granted that the argument of this volume is carried to an extreme in its analytical refinements; but, so far as exhaustiveness of research and clearness of statement can avail anything, there is presented a forcible and seemingly convincing demonstration of the fallacy of the policy of the federal administration in so far as it involves an attempt to effect a re-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

distribution of powers between the national government and the states. In a recent speech President Roosevelt said that "the American people abhor a vacuum, and are determined that . . . control shall be exercised somewhere." In our scheme of government the only opportunity for a constitutional "vacuum" is in the realm of the "reserved powers," and that realm the federal authorities seem to be attempting gradually to occupy. Against this tendency Mr. Prentice makes the most exactly reasoned and best considered protest that has yet been offered.

Among the principal theses maintained in the volume is the proposition that the grant of power with respect to interstate commerce was really restricted to interstate navigation. The decision in Gibbons *v.* Ogden indeed destroyed state monopolies of coasting navigation, but had no effect on state monopolies of interstate transportation by land, or by water when not conducted coastwise. Venerable authorities are quoted to show that commerce is a word having reference to external, not to internal, trade, and that consequently a grant of power over commerce must have been intended to mean a grant of power over external or foreign commerce only. Moreover, session laws and newspaper files are made to bear astonishing evidence of the extent to which the states actually assumed the control of certain forms of interstate commerce. "Even as late as 1855, it was generally considered, Mr. Justice McLean said, that 'the right to regulate commerce had been exhausted' in federal control of navigation." Following this line of strict construction, or of construction in accordance with the actual intent of the framers of the constitution, any assumption by the federal government of control over agencies of interstate commerce not intended by the "framers," such as interstate telegraphic lines, is improper. This, certainly, is treating the constitution "as a historical document," and rejecting all elasticity of interpretation and application, the one feature of our constitutional history which has been supposed to demonstrate the excellence of the constitution as a permanent frame of government adaptable to changed conditions not within any possible foresight of its authors. To justify the argument for this general thesis it is stated that the grant of power in the "commerce clause" was "not in terms exclusive," and an argument from analogy is advanced in the suggestion that the "federal power over bankruptcy was never considered exclusive." On the contrary, it must be recognized that the power of the federal government may be exclusively exercised in any of the spheres in which it has acquired constitutional power. The inaction of the federal government, or its action in such

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

manner as to permit concurrent state action, are not inconsistent with its claim to exercise exclusive authority in certain specified spheres of action whenever it may choose to do so. Whether, however, a certain power is within the scope of federal authority; whether, for instance, control over interstate commerce includes control over all the agencies of such commerce and over the non-commercial functions of corporations engaged, remotely or otherwise, in interstate commerce, is the real problem to which the reader will apply the arguments advanced by Mr. Prentice. While the strict constructionist theory has been unpopular for a century, and Mr. Prentice may now win few adherents, his researches have certainly made available ample material for more than one obstructionist speech in the coming session of Congress. So far, however, as Mr. Prentice advocates the serious testing of present theories of procedure by a reversion to first principles, his volume, while reactionary, is a real contribution to argumentative political science.

A consideration of the principles of individual liberty leads to the statement of what may readily appear to be a corollary of the thesis already stated, to the effect that "the right to engage in commerce is, then, part of the liberty derived from the states, which neither the United States nor the states may deny. There is no process of law by which the right may be taken." It is admitted that the exercise of this inalienable right is subject to limitations arising from federal control over foreign relations and from federal exercise of the "police power." Such a right is "an element of personal liberty which the states could not deny nor the United States impair." Thus is raised another problem of constitutional interpretation, involving the real extent of the "bill of rights" and, from another point of view, the meaning of the grant of power in the "commerce clause." The author's position is stated as follows:

> The Constitution knows no "privilege of engaging in interstate commerce." That was not a phrase which the Attorney-General learned from American history. The Constitution knows an inalienable right to engage in any of the common occupations of life, including the liberty to engage in interstate commerce, a liberty which comes from State law and belongs to those to whom the State gives it, whether citizen, corporation, or alien.

Many will think that if the framers of the constitution had so thought or intended, they would never have troubled to draft the "commerce clause," unless, indeed, that clause has, and should have, the effect or ineffectiveness here attributed to it.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

There naturally follows a protest against such extensions of the exercise of federal power as involve an unauthorized limitation upon personal liberty and upon the freedom of corporate existence and activity —such extensions as lead to "the establishment of a parliamentary despotism," and make possible "personal government, not the reign of law."

The rule of "free ships and free goods" is questionably applied in the course of the argument, and some speculation may be caused by the following statement: "Every measure which impairs the power or dignity of local governments, deteriorates the central authority." The rarity of such lapses emphasizes the scrupulous care with which the work has been prepared, while the industry, skill and conviction of the author make criticism difficult.

H. A. CUSHING.

COLUMBIA UNIVERSITY.

Englisches Staatsrecht. By JULIUS HATSCHEK. Tübingen, J. C. B. Mohr (Paul Siebeck), 1905, 1906. Two volumes: xii, 669; viii, 710 pp.

For the first time the constitution, government and administration of Great Britain have received an exhaustive treatment at the hands of a continental scholar who has no motive beyond a systematic and objective presentation of his theme. Montesquieu, stirred by the controversy between the regency and the French parliaments, discovered in England the theory of the division of powers in order that he might demonstrate at home the desirability of an independent judicial authority; and the quest after an ideal for France led him into a fundamental misrepresentation of English government. Likewise, Gneist turned to the study of English institutions when the reform of the Prussian administrative and judicial system was a pressing issue, and by reason of his sympathies he found in the "self-government" of the county gentry—a system then obsolescent and now obsolete—his ideal for Prussia. Warned by the havoc which subjective factors have wrought in the theories of his predecessors, Dr. Hatschek has not sought primarily for political morals for the use of continental statesmen but has attempted a comprehensive and detailed treatment of the English constitution as it actually exists. For this work the author is equipped by a systematic legal training and by a wide and intimate acquaintance with the literature of his subject.

In accordance with the unwritten but inexorable law of German

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

scholarship, Dr. Hatschek's first volume contains his *Grundlagen*, prefaced somewhat strangely by ten pages on the constitutional evolution of England in the nineteenth century. These inevitable "foundations" are a historical review of commentaries on English public law from Fortesque to Maine, an examination of the corporation theory in its relation to the English theory of the state, and finally a most delightful and convincing excursus on the sources of law—common law, statutes and equity. By similar academic determinism the foundations are followed by a treatise on the land and the people—the imperial dominions, England, Wales, Scotland and Ireland, the colonies and dependencies and their populations. The concluding division of the first volume is devoted to the higher organs of the state—Lords, Commons and Crown—and in it their structure and functions are analyzed to the minutest detail. Here one can find all that the most exacting scholar will desire to know about the suffrage, elections, peerage and nobility, parliamentary practice from the opening to the dissolution, the legislative, financial, administrative and judicial functions of Parliament, the historical evolution and present limits of the royal prerogative and the legal forms of royal activity in government.

The second volume, bearing the sub-title *Die Verwaltung*, falls into three parts. The first division treats of the English party system, of the structure of the cabinet, of constitutional conventions, of the formal and intimate relations of party and cabinet and of ministerial responsibility. The second division, prefaced by a full and most illuminating historical introduction, describes the administrative system in its highest and lowest ranges—the Privy Council and its functions, the secretariat, the judiciary and the local self-government down through county, municipal and district councils to the parish. The third division contains the long-desired systematic presentation of the judicial control of administration in the English system. Every branch of the administration—finance, police, education, foreign affairs, social legislation, colonies and the like—is traced throughout its complex ramifications to its wide-reaching limits.

Dr. Hatschek's is indeed a monumental work. The more obvious and familiar features of the English constitution are set forth with new commentary, enriched by reference to black-letter learning and to continental practice. Gifted with Teutonic thoroughness, the author does not despise troublesome and research-demanding details. If one wants to know when the common law entered the Gold Coast, the origin of dukedoms, the source of the Irish Order of St. Patrick, the number of private bills introduced into Parliament in recent years, the alternation

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

of political parties in power, the structure of the budget or the origin of the Inns of Court—he will find at least some desirable information in Dr. Hatschek's volumes.

The plan of the work will impress the student as logical and exhaustive, but at first glance one feature will probably strike many continental and American readers as peculiar. Party government and the cabinet are separated entirely from the structure of Parliament and are placed at the head of the volume on government and administration. This the author justifies as follows:

> The wonder of the reader at this arrangement will vanish when he discovers by his study of this volume that the superstructure of the central government, namely the ministerial cabinet, rests on party custom; that party custom runs through the entire institution of ministerial responsibility; that party custom is responsible for the division and interrelation (*Zusammenlegung*) of the central offices of administration—indeed within the central office transforms the collegiate into a bureaucratic system; that custom creates the ruling principles of the public service (for example that no permanent government official can be held responsible in parliament . . .); and, finally, that party custom sets the limits to party government, and through it brings about that continuity which the administration of foreign, military and colonial affairs requires [vol. ii, p. 1].

For those who have not yet grasped the intimate relations which exist between structure of government and politics, this sentence, in spite of its involution, will be illumining. It should be noted that by party or parliamentary control of the administration Dr. Hatschek does not mean what Gneist meant when he spoke of control through appropriations and resolutions: Gneist mistook the means for the system itself. To Dr. Hatschek the system itself is the precipitate (*Niederschlag*) of the old party conventions by which parliamentary control enters into administrative practice. A description of parliamentary government is therefore a description of these party conventions and the process by which they are interwoven into the rules of the older bureaucratic administrative routine. These party conventions are to be found in Privy Council practices, and they have spread thence into all branches of the administration.

Not only is the plan logical and comprehensive, but, wherever theory is not involved, the presentation of facts seems to be accurate. The author's passion for precision is perhaps most strikingly shown in the long list of errata which he has inserted at the end of the second volume, but there is abundant evidence throughout the work of patient and effective research. There is, for example, a delightful *Dogmen-*

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

geschichte of the royal prerogative which commands confidence by its close adherence to the sources—Year Books, Cardinal Pole, Thomas Starkey, Thomas Smith (the celebration of whose name Maitland happily lived to encourage), Davies, Cowell, Coke, Twysden and the rest (I, 600–611). There is also a genealogy of the theory of the division of powers, amplified by reference to rare tracts and even manuscript sources, which will be found very enlightening by those who have not yet got beyond Montesquieu (19 *et seq*). In short Dr. Hatschek knows his authorities and sources and has the judgment to select precisely the data that forward his theme.

Englishmen are accustomed to having their constitutional law done either by publicists who are political philosophers or by practical lawyers who have a strong sense of the real even when the reality lurks behind a legal fiction; and for them, accordingly, the value of Dr. Hatschek's book will be materially lessened by the juristic and even—to use his own word—"metajuristic" coloring which he gives to topics that admit of theoretic treatment. For example:

> By reason of the fact that the English state never became a corporation, it was never regarded as endowed with the same omnipotence and unlimited authority as the continental state. It never possessed—excepting in the Tudor times—that all-embracing police power before which the individual must always bow in dumb submission as on the Continent . . . Maitland recognized this in a striking fashion in the following words: "Some would warn us that, in the future, the less we say about a supra-legal, supra-judicial plentitude of power concentrated in a single point at Westminster, concentrated in one single organ of an increasingly complex commonwealth, the better for that commonwealth may be the days that are coming." The less of a corporation the English state is, the more nearly it remains a passive association (*bloss passiver Verband*) whose common will is always manifested through the combined working of more or less authorized organs of state, the better it will be for the individual who sees himself under no omnipotent police power [I, 93].

In common language this statement appears to mean that English government is more decentralized and interferes less with individual concerns than continental governments, and that this difference is due to the non-acceptance of the *Korporationstheorie*. To the historically minded person this explanation appears improbable, though its unsoundness cannot be demonstrated until we have a better working theory of the natural history of English institutions than the Teutonic school has given us. Anthropology must come to our aid. For the present it may be sufficient to say that if the English government inter-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

feres less with individuals than do continental governments, it is not because the English state is thought to lack the power. If Blackstone did not regard the English state as endowed with unlimited authority, it would be difficult to say what omnipotence in the domain of politics is.

Again: serious and real as Dr. Hatschek is in dealing with most matters of fact, one cannot help feeling that he has not gone to the bottom of English politics. He attributes the fundamental difference between English and continental politics to the fact that the continentals adhere more strictly to programs while the English regard politics as a sport—engaged in for the joy of doing rather than the attainment of a goal. English politics therefore takes on the form of sport, with two sides and two leaders. This comparison may be justified in recent times, but it is not true historically, as the sharp and serious opposition of the landlords and middle class during the early part of the nineteenth century shows, and it will probably not be true of the future if there is any reality to the present labor movement.

In closing his last volume, Dr. Hatschek quotes the celebrated sentence from Burke: "We procure reverence to our civil institutions on the principle upon which nature teaches us to revere individual men, on account of their age and on account of those from whom they are descended." Surely this is not the voice of science nor of reason; and Dr. Hatschek himself does not follow Burke's advice, for he sets himself, not to the task of praising or criticising institutions, but to the task of describing and explaining the workings of institutions, which is the true ideal of the scholar.

CHARLES A. BEARD.

COLUMBIA UNIVERSITY.

The Principles of German Civil Law. By ERNEST J. SCHUSTER. Oxford, at the Clarendon Press; London and New York, Henry Frowde; 1907.—xlvi, 684 pp.

Dr. Schuster is the first to attempt to present to English readers the entire private or "civil" law of the German Empire. He has not confined himself to an interpretation of the civil code, but has included also the commercial codes and the most important supplementary legislation. The success of an author in an undertaking of such magnitude and novelty should be measured by what he has accomplished rather than by any ideal standard of perfection; and it should be said at the outset that Dr. Schuster has done his work so well that his book is to be recommended to English, American and German lawyers.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

The immediate and practical purpose of the book is to aid the English lawyer in dealing with conflicts of law; and for this reason the German rules of international private law are set forth and compared with the English in connection with the matters in which choice of law has most often to be made. The author's chief purpose, however, is less narrowly practical. He desires to aid in placing the study of the English law on a higher plane. To this end a broader "grasp of principles" is necessary. This is attainable only by learning to view the law as an organic whole; and for any clear comprehension of "the manner in which the various parts . . . are correlated . . . the comparative method is as indispensable to the lawyer as it is to the biologist" (preface, p. iv). Comparison with the German law is especially valuable, because as a result of the long-continued and earnest study of Roman law on the continent of Europe, "the systematization of the law has been brought to its highest perfection in Germany" (*ibid.* p. v).

If any general criticism is to be made on the manner in which the author has executed his difficult task, it may be suggested that the differences which he points out between the German and the English rules would be more intelligible if the historical basis of the divergent English rules were briefly indicated. And the history of the German rules might well have been somewhat more fully outlined. For example, in his short but interesting sketch of the development of the "compulsory right of inheritance," no mention is made of Justinian's Novel 115. With this statute in mind, one would hardly say, as he does: "The final result of the Roman development, in its practical aspects, was the testator's complete freedom as regards the appointment of testamentary heirs" (p. 626).

One of the special difficulties with which Dr. Schuster has had to contend is the difference of terminology; and the contribution which he has made to the solution of this problem is not the least of the services which he has rendered to legal science. Goethe says: "He who knows no foreign language does not understand his own"; and the same may be said of the lawyer who is acquainted only with the technical terms of his own national law. In helping Anglo-American and German lawyers to understand one another, Dr. Schuster has not only facilitated the exchange of useful ideas, but has enabled the lawyers of each country to gain a better understanding of their own technical terms.

RUDOLF LEONHARD.

COLUMBIA UNIVERSITY.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Urkundenlehre. By WILHELM ERBEN, LUDWIG SCHMITZ-KALLENBERG and OSWALD REDLICH. Erster Theil. (*Handbuch der mittelalterlichen und neueren Geschichte*, edited by VON BELOW and MEINECKE.) Munich and Berlin, Oldenbourg, 1907.—x, 369 pp.

Of the various so-called sciences auxiliary to the study of history, diplomatics is one of the most recent and least complete. Although its origin goes back to Mabillon and his Benedictine successors, its differentiation from palæography and chronology and its development by monographic investigation lie entirely within the past half century, and the first comprehensive and scholarly manual, the *Handbuch* of Harry Bresslau, appeared in 1889. The pioneer in systematic instruction in this field was the École des Chartes, and it was a pupil of this school, Theodor von Sickel, who established the Institut fur österreichische Geschichtsforschung at Vienna and became the founder of the Austrian school of investigators to which the recent advances of the science are largely due. Diplomatics is almost entirely the creation of German, French and Italian scholars; Great Britain and Spain still lag far behind in all that relates to the scientific study of documents. Even the name diplomatics has hardly become naturalized in English; the University of Oxford insists upon the singular form, and many who ought to know better still confuse diplomatics with diplomacy. Moreover, even in the countries where it has been most actively studied, diplomatics is not *une science faite*. The distinguishing characteristics of the charters of French kings and German emperors are now fairly well understood, at least for the earlier period; but the opening of the Vatican archives has placed at the disposal of scholars an enormous body of material which is still far from being exhausted, while with the charters of lay and ecclesiastical lords and private documents of all sorts scarcely more than a beginning has been made.

In a field where investigation is going on so rapidly there is room for a fresh summary of results, and it is entirely appropriate that the latest manual of diplomatics should bear the names of two Austrian professors and should be dedicated to Theodor von Sickel. The new handbook is fuller than Paoli's *Programma* and the outline published last year in Meister's *Grundriss der Geschichtswissenschaft*, but it promises to be less extensive than the classical manuals of Bresslau and Giry. At the same time it omits the chronological and other ancillary matter that swells the bulk of Giry, so that on most topics of pure diplomatics the treatment is fuller, and its scope is widened beyond that of Bresslau so as to include France as well as Germany and Italy. Redlich contributes

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

the introduction only, which sketches the history of the subject and defines its fundamental terms. In the rest of the volume Erben traces the history of chanceries and the development of the external and internal characteristics of charters down to the close of the Middle Ages, leaving for the second part the important topic of private documents. The use of the comparative method throughout brings out much that is suggestive, although this form of treatment has its drawbacks if one wishes to follow the development of a particular type of documents such as those of the French kings. The doctrine is scholarly, the bibliographical material is excellent, and the references to facsimiles under each heading will prove especially helpful. Altogether the manual must be pronounced an excellent member of the useful series in which it appears.

CHARLES H. HASKINS.

HARVARD UNIVERSITY.

The Economic Development of a Norfolk Manor, 1086–1565. By FRANCES G. DAVENPORT. Cambridge University Press, 1906.—xii, 106, cii pp. and map.

Few attempts have been made to deal with the history of single manors in England during the mediæval period from the standpoint of modern scholarship. Some of the more important writings on the subject have been cross-sectional in character, treating of conditions at a given period and drawing their evidence from widely scattered sources. Generalizations based on varied and isolated materials are liable to constant modification, and the need of studies in the continuous history of single manors is manifest to all. In her investigation of the records of Forncett Miss Davenport has shown what can be done in this direction, and her results, as far as they go, are unimpeachable.

Though the accessible mass of manorial records in public or private possession in England is very voluminous, it is a matter of no small difficulty to discover among them a continuous series for a particular manor during the mediæval period. Few will ever have the good fortune to study such a beautiful series of rolls as that which Mr. Pell placed in the hands of Professor Maitland, and from which the latter wrote his paper on the manor of Wilburton. In most cases the student will have to search, as did Miss Davenport, a dozen different depositories before finding the desired material, and even then the series will probably be far from complete. Miss Davenport is particularly unfortunate in that she has been unable to discover any records either for the years 1308–1375, a time of great changes in the organization and administration of the

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

manor, or for the years 1379–1399, when the Peasants' Revolt and its accompanying disorders were the most significant economic events of the time. The latter break in the sequence is much to be regretted, because Forncett was situated in the neighborhood of one of the most interesting of the peasants' uprisings.

Miss Davenport's study is thorough and impartial. Her comparison in the opening chapter of an Elizabethan survey with the entries regarding Forncett in Domesday makes clear the topography of the vill, the territorial development of the manor, and the distribution of tenants and tenements, both free and servile. This chapter is preceded by an admirable map. Chapters ii-iv describe the demesne—lands, buildings, officials, servants, cultivation, crops, hay, pasture, wood, manure, livestock, mills, receipts, expenses, rents and works—during three periods, 1270–1307, 1376–1378, 1400–1605. Chapters v–vii cover the tenants and their lands, status, services and payments, for the years 1272–1306, 1376–1378, 1400–1575. A final chapter discusses the question of population, and is followed by a number of appendixes, chiefly documentary.

Upon the demesne, during the first period, conditions remained stationary, but differed in some interesting particulars from those which appear to have prevailed elsewhere. The area of the average tenement was small, showing overpopulation in 1300; the manor house seems palatial for so small an estate; the arable lands to an unusual extent lay outside the open fields and were apparently cultivated in large part continuously without fallowing; hired farm laborers were more numerous than has been commonly supposed for this period; and the practice of selling large quantities of wheat, barley and peas off the estate and, occasionally, of drawing on the stock or food of other of the lord's manors to make up deficiencies at Forncett seems exceptional. One is struck also with the abundance of money at Forncett, as seen in the high rents paid by freeholders and sokemen and in the number of *nativi* paying chevage. Miss Davenport thinks that this was due to the nearness of Forncett to the city of Norwich. If so, it shows the importance of studying each manor by itself and of taking into account all the local influences before drawing final conclusions.

After 1306 important changes took place, which are recorded in the rolls of 1376–1378. Population had decreased, labor-services had consequently decayed or were difficult of exaction, and the lord had been forced to lease or farm his buildings, gardens and arable land. A great reduction in the number of resident officials was consequently made, and the direct interest of the lord was limited to a few buildings,

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

the pasture and the waste. After 1400 these changes proceeded more rapidly; the leases were for longer terms and finally became tenures at fee farm. By 1406 nearly all the demesne had been converted into leasehold, and the old system passed into its final transformation. Even the manor house had disappeared before 1491.

Equally important changes appear among the tenantry and the tenements, though the evidence on this point is less definite and satisfactory. Freeholders, sokemen and customary tenants made up the population. Of the freeholders little seems to be recorded; they were numerous and did a small amount of labor, evidently on boon days only; but freeholds decreased by conversion into soiled land during the fourteenth century. After 1400, becoming more conspicuous as the local gentry, freeholders began to acquire copyhold. The tenements of sokemen, who did little or no week-work, and those of customary tenants, holding five acres and less and doing week-work winter, spring and summer, had both become copyhold by 1400. For many reasons, death, infirmity, poverty, flight and failure to enter on the inheritance, large amounts of base land escheated to the lord during these periods and was let by him at a money rent. Such rentals increased as the population diminished, as the remaining bondsmen became more prosperous, and as the rents, high in the days of custom, were lowered by competition. At the same time the holdings increased in size as the tenants began to enclose their lands in the open fields, though there is but little evidence of enclosures for sheep-raising. The decrease in the number of bondmen was due to manumission, lack of male heirs and the flight of serfs from the manor, a point upon which Miss Davenport lays particular emphasis. By 1575 serfdom had come to an end in Forncett. On the question of population the evidence seems to show that during the period from 1376 to 1565 the numbers on the manor were only about half as great as they had been during the early part of the fourteenth century. It is manifest, however, that this conclusion can have but a slight bearing on the question of the entire population of England.

Such, in brief, are some of the results of this excellent piece of investigation. Though it leaves many questions unanswered, and though in some respects the picture is not as clear as we might wish—the sokemen still remaining something of a puzzle—we can but feel content with a work that is in the highest degree painstaking and scholarly.

CHARLES M. ANDREWS.

BRYN MAWR COLLEGE.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

The Seigniorial System in Canada. A Study in French Colonial Policy. By WILLIAM BENNETT MUNRO, Assistant Professor of Government in Harvard University. New York, Longmans, Green and Company, 1907.—xiv, 296 pp.

In an age of historical researches it is not very often that a writer has the good fortune to discover an institution of real importance on which little has been written, and of which it is possible in moderate compass to describe the growth, the maturity, the decline and the fall. Professor Munro has found such material and has presented it in an excellent monograph. His work is based throughout on original sources, most of them fairly accessible but hitherto undigested. He has presented us with a clear, well-written and judicious account of the whole matter. We are glad to hear that he is to round off his task by editing for the Champlain Society a selection of the principal documents.

It is hard for us nowadays to associate feudalism with the new world. That anybody on the American continent should have had vassals over whom he might exercise *haute justice*, or from whom he might exact the *corvée*, strikes one as out of place, like chain-armor in Chicago. The relation of suzerain and vassal seems to be one of those outworn institutions of an old society which no one would dream of transplanting to a new country; and indeed the story of the Canadian seigniors, as late as in the year of grace 1775, calling out their vassals to render military service and being repulsed with sticks and stones, sounds like a bit of comic opera. Yet perhaps the strongest impression left on the mind after an attentive study of Mr. Munro's book is that the French statesmen who introduced the seigniorial tenure into Canada were well-advised. Few will regard its disappearance or deny that in 1854 its usefulness was gone; but in the early days of the colony it rendered real service, and was well adapted to ensure the settlement of a wild country. In fact there was in Canada a reproduction of some of the conditions out of which European feudalism had sprung. The remoteness from the central authority and the absolute need of every little community having a leader on whose protection the whole body might rely, are almost as clearly seen in the seventeenth century in Canada as in the seventh century in Gaul. When the daily peril from the redskins had passed away the seigniory was still a useful bond to hold together the simple, illiterate *habitants*. The seignior and the *curé*—natural and traditional allies—were the leaders, advisers and friends of the little group which nestled round the *manoir*.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

It must always be remembered that feudalism in Canada was of a benignant type. The seignior could not hold his lands unconceded. He was bound to make grants at the rates current in the neighborhood. The annual dues were almost nominal, as is shown by the fact that in many cases the farmers have not availed themselves of the statutory right of commutation. The ease of appeal and the supervision of the intendant made it impossible to turn the seigniorial justice into a means of oppression. The banal mill was, in the early days at any rate, an advantage for the *habitants* rather than a source of profit for the seignior. A pleasing picture of the simple patriarchal life of an old seigniory, romanticised no doubt but essentially true and painted from the writer's own experience, may be found in *Les Anciens Canadiens* by de Gaspé. The serious grievances which led to the sweeping-away of the whole institution were the mutation fine of one-twelfth and the reservations frequently made against erecting mills *etc.* on the lands.

Mr. Munro begins with a rapid sketch of feudalism in Europe, and then discusses in detail the forms of tenure employed in Canada, the duties owed by the seignior to the Crown, or to the mid-superior in the case of an *arrière-fief*, and the duties of the vassal, or *habitant*, as he was generally called in Canada. In separate chapters he treats of the banal rights, of the *corvée*, of seigniorial justice, of the seigniorial *noblesse*, of the seigniorial system and the church, of the system under British administration and of its abolition by the act of 1854.

There are a good many points upon which opinions may differ, but no fault can be found with the careful and judicious treatment of the subject in general. I do not think, however, that it is correct to suggest that the selection of the *Coutume de Paris* as the law to be applied was an arbitrary choice, and that it might have been better to take the *Coutume de Normandie*, seeing that most of the settlers were Normans. Long before that time the *Coutume de Paris* had acquired such a preëminence among the *coutumes* that its application in the French colonies was clearly indicated. And Mr. Munro follows Messrs. Doutre and Lareau too closely when he says, on page 65 : "It is at best questionable whether any royal decree issued after 1663 could be binding in the Colony without having been enregistered by the Council at Quebec." This is much too mild a statement. The controversy is an old one, but few lawyers will dispute that it has now been settled by judicial decision that no unregistered ordinance was binding in the province. The present writer may be allowed to refer for a note of the authorities to his little book on *The Scope and Interpretation of the Civil Code*, which has appeared since the work of Mr. Munro.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

The foregoing criticisms, it will be noted, deal with minor matters. Professor Munro's book is to be heartily recommended to all students of Canadian institutions.

F. P. WALTON.

McGILL UNIVERSITY, MONTREAL, CANADA.

Reconstruction in South Carolina: 1865–1877. By JOHN S. REYNOLDS. Columbia, S. C., The State Publishing Company, 1905. —522 pp.

This work would have been much more interesting, if not more instructive, had it not been thrown, to so great an extent, into the shape of annals. The author chronicles incidents of no particular significance simply because they happen to be cotemporaneous with events that are landmarks in the history of the period. His accounts of the proceedings of conventions and legislatures look like mere transcripts of the journals of those bodies; and his review of the outrages perpetrated during the years of which he treats is interlarded by many trivial items. Constitutions, laws, reports, addresses, platforms, even the rolls of the two houses of the legislature, are given *in extenso* instead of being put into synoptic form or relegated to an appendix.

Nevertheless, by reason of this very fault, which is after all but superficial, the work may be the more valuable to the painstaking student because it depicts the horrible condition of affairs in the state with an approach to photographic accuracy. John Randolph once remarked that, after Shakespeare seemed to have "sounded his lowest note" in drawing Shallow and Slender "as the comparative and superlative degree of fatuity", "as if reveling in the exuberance of his power" he produced Master Silence "as the *ne plus ultra* of inanity and imbecility." So, if we take the reconstructed states of Alabama and Louisiana as the comparative and superlative degree of corruption and disorder, we must take the reconstructed state of South Carolina as the *ne plus ultra* of rottenness. This was necessarily the case, because South Carolina was the only state subjected to the procrustean process devised by Congress, in which the colored registered voters ruled with unobstructed sway, outnumbering the whites by nearly two to one and led by a coterie of adventurers from the North, fitly named carpet-baggers, with a sprinkling of renegades of the soil, fitly named scalawags—not so benighted, these latter, as the freedmen, but much more corrupt than the freedmen had yet learned how to be. Benjamin F. Perry, then provincial governor, warned the Congress of the consequences of forcing its plan upon the state:

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

This idea of placing the government of these states in the hands of negroes is preposterously absurd. None of them have property and not one in five hundred can read or write. In the recent election . . . many . . . had forgotten their names and scarcely one in a hundred could tell after election for whom he voted. . . . The negro is the most credulous being in the world. . . . He has been told that unless he voted the Radical ticket he would be placed back in slavery, and that if he voted that ticket he would have lands and mules given him. In some instances the negroes actually brought with them bridles to take their mules home with them.

Out of the one hundred and twenty-four delegates to the constitutional convention seventy-six were colored, forty-eight were white, and all but four were Republicans. Of the colored, fifty-nine paid no taxes, and the remainder paid but $212. Of the whites, twenty-three paid nothing; one, who was a Conservative, paid $508; and the remainder paid $252. The first legislature was composed of eighty-eight colored members and sixty-seven whites, of whom twenty were Democrats; ninety-one of the one hundred thirty-five Republicans paid no taxes. Of the five South Carolinian representatives in the forty-third Congress, four were negroes or mulattos—"Daddy" Cain, as he was called, a negro exhorter from the North, being the congressman-at-large.

With such a start, it is no wonder that in the eight years of their rule they swamped the state. Says the author, in the beginning of his chapter entitled "The Story of the Frauds":

> While the Republican leaders themselves admitted the charge of misgovernment and even that of venality, yet the extent to which corruption permeated every branch of the public service . . . was not realized until, after the robbers had been driven from power, there was an investigation by committees who aggressively undertook to justify the charges . . . that the Government of South Carolina was steeped in rottenness and that its agents were with very few exceptions actually thieves and perjurers.
>
> From the reports of these committees, founded in every instance upon sworn testimony, . . . is made up the presentation now to be given.

In four years they more than trebled the bonded debt—making in 1868 an overissue of bonds of one million, in 1869 of another million, in addition to the so-called "conversion bonds" of six millions, which a subsequent legislature was obliged to repudiate. A syndicate, composed of the governor, treasurer and attorney-general and one of the United States senators, bought stock in a railroad company, for which the state had paid twenty dollars a share, for two dollars and ninety-five cents a share, causing a loss to the state of $374,000, and then bribed

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

the legislature to release the company from the state lien of five and a half millions, sharing the plunder among themselves. An act in favor of another railroad, in which the same financial board was interested, was passed by use of its scrip to the amount of $42,000 to pay the House and $50,000 to pay the Senate. An effort to impeach the governor and treasurer, encouraged by the senator to force the governor to come forward with the coin, was foiled by the threatened officials abstracting from the fund for the preservation of the peace $25,000 at one time, $10,600 at another, $12,500 at another, to buy up the members of the impeaching body. Patterson, the senator, bought his seat for $40,000, sixty legislators testifying to his bribes. The aggregate amount paid for the public printing in eight years was over $1,326,000, being $700,000 more than the total paid in the preceding seventy-eight years. In the session of 1868–69 $15,000, in the session of 1870–71 $21,000, in that of 1872–73 $94,000 were divided up between senators and representatives as their percentage for appropriating the money. For "sundries, wines, liquors, cigars, groceries and dry goods," supplied during four sessions, there was paid over $540,000: "the average daily consumption of liquor (not including ale or beer) was more than a gallon for every member of the legislature." "For furniture alone, there was expended during four years more than $200,000, and of the articles thus bought there remained in 1877 only enough to be valued at $17,715." The author gives a table showing "the extent to which the tastes of the legislators in the matter of furnishing were educated": $5 worth of clocks in 1868–70 had grown in 1871–72 to $600 worth; $4 for looking-glasses to $600 for mirrors; 40 cents for spittoons to $8 for cuspadores; clay pipes to the finest Havana cigars; cheap whiskey to champagne. Bills for furnishing the halls and committee rooms aggregating $40,000 were reported at $90,000, and the difference was divided between fifty members of the House.

But enough and more than enough of this, for every item of which the author gives chapter and verse. At the end of eight years came the catastrophe. The campaign of Greeley warned the intrenched robbers of its approach. Chamberlain, elected governor in 1874, made some futile efforts in the direction of reform, only to be attacked by his former associates. Their accumulated iniquities became so rank that they smelled to Heaven, and the Republicans of the North could no longer bear the shame. In 1876 Wade Hampton was elected governor; but the spoilers still clung to their prey. President Grant with the help of the soldiers installed the defeated candidates. But their hour had come. The returning board, composed of five Republican

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

politicians, three of whom had been candidates for reëlection to the offices they disgraced, cast the electoral vote of the state for Rutherford B. Hayes, who was hardly warm in the seat the Electoral Commission bestowed upon him when he withdrew the federal forces, and the fabric that had so long polluted the air sank to the ground, many of its upholders seeking refuge over the borders from the consequences of their crimes.

The fiery little state, whose foolhardy rashness had precipitated the civil war, suffered, indeed, a most cruel and unusual punishment, her proud planter aristocracy trampled in the mire by skipping herds of its former slaves. She emerged from her "Baphometic-fire baptism" a new creature, freed from the blight of African slavery and set on the road to commercial prosperity, it is true; but the inbred courtesy, the high sense of honor, the ease and refinement of manners, the social charm, and the abhorrence of vulgarity, meanness and the petty tricks of the market-place—traits which distinguished the community that gave birth to Calhoun—had vanished from the soil.

DAVID M. DEWITT.

KINGSTON, N. Y.

The New Earth; A Recital of the Triumphs of Modern Agriculture in America. By W. S. HARWOOD. New York, The Macmillan Company, 1906.—xii, 378 pp.; 50 plates.

This book outlines, in simple language and in attractive style, the progress which has been made in the art of husbandry as a result of the application of science to the many problems which confront the farmers of America. The author has apparently made a careful study of the work that has been done in dispelling ignorance and expelling superstition from the realm of agriculture and in bringing science to bear upon this oldest of the arts in such a manner as to rationalize the farmer's activities. Commencing with the foundation of all agriculture, he tells of the work that has been done and is being done to increase our knowledge of the physical, chemical and biological (or more specifically bacteriological) characteristics of the soil; and he shows how this increase in knowledge increases the quantity and the certainty of our crops. The selection and breeding of plants to fit a particular soil or climate, and at the same time to meet the needs of modern commerce, are discussed with especial reference to recent results in the improvement of corn and wheat. Successive chapters are then devoted to "Plant Development," "The Enemies of Plant Life," and "The Weeds of the Earth." In two chapters on "Luther Burbank" and

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

"Horticultural Progress," the author reviews the work of this eminent man and of many others in the introduction and development of new and more profitable varieties of fruits, with a statistical statement of the results. One of the best chapters in the book is devoted to "Modern Forestry," the work of the federal and state departments of agriculture in the preservation and development of our forest resources. "Modern Dairying" is discussed with especial reference to the influence upon the development of dairy interests of the cream separator, invented by de Laval of Sweden, and of the Babcock test, invented by Dr. S. M. Babcock, agricultural chemist in the University of Wisconsin. The chapter on "Animal Husbandry" emphasizes the importance of the work done in the improvement of our breeds of horses, cattle, sheep and hogs. Under the caption of "Reclaiming the Earth," the author reviews the work of the reclamation service of the United States geological survey; the soil investigations conducted by Professor E. W. Hilgard of the California experiment station; the development in the experiment stations of the arid and semi-arid states of new methods of culture to preserve moisture, known as "arid farming" or "dry farming"; and the progress that has been made in the introduction and in the development of drouth-resisting plants of commercial value, perhaps the most important thus far being the macaroni or durum wheats, which have enabled the farmers of the Dakotas to extend the wheat belt many miles farther west than was possible with the old varieties. "The Foods of the New Earth," "Coöperation" and "The Selling of the Surplus" are interesting and instructive chapters; and they are followed by three chapters describing the facilities of the experiment stations, the agricultural colleges and the United States department of agriculture for carrying on research work in the sciences relating to agriculture and for promoting agricultural education among the farmers.

The book is not a contribution to the science of agriculture. It is a popular book indicating what science is doing for agriculture, and as such it will find a useful place in the world of books. The specialist will find the discussion of his subject very unsatisfactory, but he will be a broader man from having read something about the work of other specialists. But it is for the men who desire to know something of the recent progress in agriculture, without reading all the reports of the department of agriculture and the experiment stations, that the book is especially suited. The economist should read it, for he will learn much that is worth his while; yet if he wishes to get more than a general view of any special phase of agricultural progress he should turn to the

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

sources which the author has used. For this purpose the value of the book would have been much enhanced by inserting references to materials. Considerable portions of the book are devoted to poetic effusions which diminish the effect of its solid material. The plates are distributed without any regard to the context. This is confusing and should be remedied in future editions.

HENRY C. TAYLOR.

UNIVERSITY OF WISCONSIN.

Die Verschuldung des bäuerlichen Grundbesitzes in Bayern. By Dr. ARTHUR COHN. Leipzig, Duncker and Humblot, 1906.—xix, 470 pp.

This volume is a contribution to the history of agricultural credit in Bavaria from 1598 to 1745. According to the author 1598 marks the establishment of the mortgage and 1745 the beginning of the period of enlightment (*Aufklärungsperiode*). The limitation of the inquiry regarding the origin and development of peasant indebtedness to this period of history is justified on the ground that the writer's purpose is simply to lay a foundation upon which others may build in the future. The only question we need consider, therefore, is this: Has the author laid a substantial foundation?

Judging from the fact that the work is written from the historical-political point of view, we unqualifiedly answer the question in the affirmative. Before attempting to set forth the facts of history relating to the subject under discussion, the author traces, in an introduction of 55 pages, the development of the right of holding real estate from feudal and communal ownership through the family to individual peasant ownership. The ceremonies by which land transfers were made and acknowledged before the origin of documentary forms of indebtedness are also described, together with the parts the church and state played in the proceedings which in the course of time led to the liberation of the peasantry from their original enslavement to the land.

To the student of modern agricultural economics these pages form a valuable contribution to the history of the subject. They furnish the foundation for a study of systems of land tenure and the effects of the method of holding land on the welfare of the farmer. The economic, social and political life of the Bavarian peasantry, for example, may be compared with that of the farmers of America or New Zealand. In the three countries the theory of land tenure is different. In Bavaria land ownership has come through the communal and feudal systems, in our own country practically through original free grants, and in New

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Zealand through the "principle of state ownership of the soil with a perpetual tenancy in the occupier." The author's introduction contains a succinct statement of the Bavarian system of land tenure and gives glimpses of the social life of the people.

With the facts of these introductory pages in mind, it is easy to realize that the idea of credit rests on the existence of property. This is the keystone of the structure. The right of property is shown to rest on ethical and economic foundations and not on force. The rise of economic relations is the cause of the need of credit. But the limitations under which the peasantry held their lands, the high rates of interest originally charged for borrowed capital, the lack of proper implements for cultivating the soil, the effects of bad harvests, the ravages of war, to say nothing of the liability of peasants to have their crops seized by lawless lords—these facts and others made the burden of indebtedness hard to bear.

The peasant class, therefore, the author says, was freed from the bondage to the land as serfs, only to be plunged into the bondage of economic indebtedness. But as the state of society became more settled there was a tendency on the part of the government to aid the peasantry by establishing a rate of interest at five per cent, by forbidding usury and by granting special exemption from taxation in times of bad harvests. The church, likewise, brought its influence to bear along these lines. But what is most strikingly shown by the author is that the state was more ready to extend assistance at that time than it is to-day, though modern civilization boasts of its "railroads and steamships, grain exchanges and storehouses, mortgage banks and loan associations, savings banks and insurance societies" (p. 337).

Thus the author takes the reader through this century and a half of Bavarian agricultural history in detail. His summary (pp. 360–454) is the most interesting part of the treatise. The causes of indebtedness and the need of credit are shown to have been the same then as they are at the present time. But what lessons does the past teach regarding the welfare of modern farmers? Among the many lessons taught these stand out prominently—that capital should first be concentrated, that it should then be directed into proper channels, that farmers should coöperate and that agriculturists should undertake to extend credit among themselves. The past points out a definite road—from bondage, to freedom, to organization (p. 453). For the indebtedness on land the author sees no remedy, but he indicates how the economic condition of the peasantry in general may be improved. Improvement can only take place along economic lines. The conflict against the peril of

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

indebtedness is essentially nothing else than a conflict against the injustice of economic and social relations.

So far as the suggestion regarding the organization of agriculture is concerned, it may be said that it comes rather late. Farmers all over the world have for many years been organizing for the coöperative transmission and sale of products, purchase of fertilizers and machinery, establishment of credit banks *etc.* And as to there being no remedy for indebtedness, even should the present coöperative movement among farmers not come up to the standard of its most ardent advocates, the lessons of present experience may point the way to ultimate success. But this, of course, is a problem of the future.

JAMES B. MORMAN.

UNITED STATES DEPARTMENT OF AGRICULTURE,
WASHINGTON, D. C.

Essays and Addresses on Economic Questions. By Viscount GOSCHEN. London, Edward Arnold, 1905.—xii, 354 pp.

The essays and addresses composing this volume cover many of the most important practical economic questions of the period 1865–1893. The first essay, entitled "Seven Per Cent," deals with the extraordinary expansion of British trade in the years 1863–64. The most striking feature of that period of prosperity was the high rate of interest. In this essay the author committed himself to the view that owing to the appearance of the joint stock finance company, through the activities of which capital could easily flow to all parts of the world, interest had reached a new level. This view was proven untenable by the facts of the year 1867, when business depression forced the rate of interest to two per cent. The events of that year are described in the second essay, under the title "Two Per Cent."

The third chapter of the book is a reprint of a speech delivered in 1891 on the cash reserves of Great Britain. At that time Lord Goschen feared that the conservative traditions which had in the past given character to British credit were decaying. Bankers and business men alike showed a disposition to invest every available penny, leaving nothing in reserve for a time of need.

In the fourth chapter a careful analysis is given of the depreciation of silver (1876). As chairman of the committee of the House of Commons appointed to investigate the depreciation of silver, Lord Goschen was in an excellent position to study the causes and the effects of the phenomenon.

The fifth chapter, on the "Condition and Prospects of Trade," an

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

address delivered in 1885, is an early contribution to the literature on the decline of British trade. The author analyzed in a masterly manner the statistics of trade and industry and showed that at that time Great Britain, though suffering from the world-wide depression, was still holding her position of industrial leadership.

The most interesting section of the work is on the "Increase of Moderate Incomes," an address delivered in 1887. Like most writers of the liberal school, our author regarded an increase in the number of moderate incomes as highly desirable from every point of view. In 1887, when he was chancellor of the exchequer, he made an exhaustive investigation of the subject, and reached the conclusion that the number of incomes of less than £2000 was increasing more rapidly than the general population, while incomes above £2000 were not keeping pace with the population; further, that the number of incomes under £500 was increasing more rapidly than those above £500. If this conclusion was correct, it was obviously of the greatest interest to all students of the distribution of wealth. In a supplementary study the author attempted to bring his results down to date (1903). The evidence is confusing; it does not appear, however, to bear out the contention of the earlier study.

The remaining chapters on "*Laissez faire*," "Ethics and Economics" and "Insurance" were of value when first published but are of little interest to-day. They serve to make clear the author's point of view—that of a broad-minded adherent of the liberal school.

ALVIN S. JOHNSON.

UNIVERSITY OF NEBRASKA.

Die Weltwirtschaft: Ein Jahr- und Lesebuch. Herausgegeben von E. VON HALLE. Leipzig, B. G. Teubner, 1906. Drei Teile: I Teil, *Internationale Uebersichten;* II Teil, *Deutschland;* III Teil, *Das Auslana.*—366, 253, 281 pp.

Emphasis must be laid upon the word *Lesebuch* in the above title. The purpose of Professor von Halle and his collaborators is not merely to issue a statistical year-book dealing with economic conditions the world over; they have sought also to present their materials in interesting form; and, with due allowance for the rather dry nature of the subject, it must be conceded that most of the essays forming the collection are distinctly readable. In the choice of contributors preference has been given, so far as possible, to specialists who are citizens of the various countries dealt with. Partisan and national prejudices have been avoided. A broad interpretation has been given to the con-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

cept of *Weltwirtschaft:* thus we find in all three of the parts a large share of attention devoted to the political and legal developments which are so potent to influence the course of events in the economic world. It was certainly a commendable thought, also, to give particular prominence throughout to those industries whose products are of an artistic character.

So much for the purposes pursued by the new year-book. A word is now in order as to the contents of the three parts of the first annual issue. Part I, "International Survey," besides the more general topics referred to above, presents extended essays on "The World's Production, Agricultural and Industrial"; "The World's Money Market"; "The World's Commerce"; "The World's Transportation"; "Insurance Systems"; "Finances of European countries and of the more important countries outside of Europe"; "Technical Progress in 1905"; "Poor Relief"; and "Economic Legislation." Part II, "Germany," thoroughly analyzes the industries of that country in a great number of papers of from three to five pages each in length. Part III, "Foreign Countries," contains papers on the British Empire, the United States, Russia, Sweden, Norway, Denmark, Holland and its colonies, Belgium including the Congo State, Austria, Hungary, France, Switzerland, Spain, Italy, the Balkan countries, East Asia, and South America. Professor Henry C. Emery contributes most of the material on the United States, aided by Professor H. C. Taylor who writes on agriculture, Professor John R. Commons, on labor, and Professor J. P. Norton, on the banking and exchange situation.

Considering the conditions as to time under which this year-book has been produced, it deserves high praise both for accuracy and fullness. Such omissions as are noted in the first annual issue (see particularly introduction to the third part) will doubtless be provided for later. In the very nature of the case Professor von Halle's compilation will reach its highest usefulness in the hands of German business men, statesmen and economists; indeed, one is reminded occasionally that the German national viewpoint has by no means been adjusted properly to the purposes of a world survey. American students will find the work extremely valuable as a means of bringing down to date such encyclopædias as Conrad's. The *Weltwirtschaft* also has certain advantages for economists over the *Statesman's Year Book*, chiefly in that it is devoted primarily to economic subjects, and further because of the extremely intelligent and more adequate discussion with which it clothes the dry bones of statistics.

ROBERT C. BROOKS.

SWARTHMORE COLLEGE.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

The New Basis of Civilization. By SIMON N. PATTEN. New York, The Macmillan Company, 1907.—viii, 220 pp.

This volume, the first in the *American Social Progress Series* edited by Dr. Samuel McCune Lindsay, contains ten lectures delivered in 1905 before the New York School of Philanthropy. These papers are significant both as a new organization of the author's well-known theories and as an attempt to provide a comprehensive social philosophy applicable to current movements for amelioration and reform.

The underlying thesis of the book, which is implied in the title, is that within the last century the industrial revolution, with its steam production, steam transportation and urban growth, has so radically changed the conditions of social development that old forces are either greatly modified or no longer operative, and that consequently the theories derived from these out-grown situations have lost both their scientific validity and their practical value; in short, that civilization is rapidly shifting to "a new basis" which demands new theories, new standards and new methods. The fundamental cause of this change is traced to the transition from a "pain" or "deficit" economy, in which men are afflicted and coerced by want, war and fear, to a "pleasure" or "surplus" economy, under which they are free to follow interests and to express enlarging personality in terms of work, pleasure and civic coöperation. All the higher social phenomena, morality, ideals, religion, are ultimately referable to the economic situations by which these are fostered, and types of character developing in the social milieu are in final analysis to be explained on the same basis.

Professor Patten almost rivals Henry George in his estimate of the material resources of modern society, as these are exploited by intensive agriculture and machine industry. The disparaging allusions to the law of diminishing returns and the Malthusian doctrine of population emphasize the author's confidence that the economy of surplus has a secure future. The abolition of poverty, which, by implication at least, is defined as falling below the line of "complete nutrition" and of "family continuity," is declared to be both a possibility and a test of the régime of surplus. Aside from a few casual allusions to Malthusianism and to misinterpretation of population statistics, Professor Patten does not directly address himself to the problem of increase of numbers in relation to food supply. There are hints which seem to warrant the belief that he relies upon rational checks; he certainly counts upon the abolition of those involved in a "pain economy."

"We try to suppress vices when we should release virtues" offers a

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

clew to Professor Patten's theory of heredity and environment. He insists that heredity sows the seeds of virtues and vices in men, but that their relation to nature and to the social situation determines the development of the one or the other. Progress, then, need not depend upon the slow processes of organic evolution, but may be rapidly furthered by changes in the environment which stimulate dormant characteristics. Here is emphatic repudiation of the theory that human nature is a fixed, unalterable thing, expressing essential uniformities under superficially changing forms. It is rather a complex of characteristics which may be evoked or suppressed by the social situation.

Like most of the author's work the present volume is essentially a study in social psychology. Conventions, characteristics and ideals are traced genetically as social, and largely economic, products. The "surplus" economy projects itself into a society still dominated by the traditions of a "pain régime." Sacrifice was a virtue under earlier conditions, but it must now yield to generosity; the martyr is a useless type under whose influence we "have made an art of wretchedness," personal sacrifice cannot cope with modern complexity; the mother in the tenement must have the aid of the city in guaranteeing sanitary conditions and hygienic food; the modern Samaritan sees to the policing of the road to Jericho; "income generosity," *i. e.*, willingness to give to public concerns and to pay taxes, is the needed modern virtue. Much stress is laid upon the educative power of civic consciousness. "The march of the lowly is not 'back to nature interests,' but 'forward to communal interests.'" The city is regarded not as an evil to be abolished, but a potential good to be developed into an inspiring common life, in which a new pride and loyalty are to be fostered. Under their influence the asperities of class feeling will disappear, and a democracy of work, "flowing along interesting, productive and recompensing processes," will express itself in new and higher types of character.

Surplus energy and imagination, possible only to a well-nourished people, are the conditions out of which the new ideals must develop. Only as interest can be transferred from the moment to the complete day and then to the complete life, is stable character achieved. Not until communal obligations can be made to appeal to men as vividly as does the dashing ambulance, can "economic altruism" and "service-altruism" fulfill their modern purposes.

In practical application, Professor Patten's philosophy is social rather than individual. It insists upon the community's responsibility, upon the need of perfecting public services, of offering a variety of

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

stimuli in amusement, education and group life, upon not only coöperating with the family but frankly relieving it of many of the duties assigned to it under a "deficit" economy in rural conditions. This philosophy, too, aims at fostering new and vigorous types of character, free from the submissive, sacrificing, exploitable traits of a "pain economy," but disciplined by cheerfully performed work and directed by a vividly conceived loyalty to the community.

Professor Patten divides social workers into two classes: those who believe in the value of art and virtue and confide in the leadership of exceptional genius, and those who have faith in humanity and in its inherent capacity for advance. The first class must seek their ends by direct means, *i. e.*, by teaching art and virtue, but the second will employ indirect methods, *e. g.*, they will aim at prosperity by improving health, at temperance by diet, at self-denial by self-expression, at saving by generosity, at goodness by efficiency, *etc.* It is to the second class that these lectures are addressed. The success of the application of this philosophy will be "measured by the number of independent, self-supporting families it makes."

To criticise in any detail a volume like this, apart from the other work of the author, would be manifestly unfair, for these lectures recast in brief and popular form ideas which Professor Patten has in many instances elaborated in his earlier books and articles. Hence this review has sought chiefly to set forth the leading theories of the book. To conservative thinkers Professor Patten's attempt to demonstrate a radically new social order will be hardly convincing. The contemptuous dismissal of the Malthusian doctrine and the triumphant display of the exploited resources of a new country will not wholly satisfy those who study the industrial and social situation in Europe and who see no sure way of permanently postponing similar conditions in this country. Again, minds of the same temper will seriously question whether the rational element upon which Professor Patten counts will assert itself, nor will they follow the process by which class conflict is to be transformed into a kind of democratic comradeship.

But even if some of these things seem utopian, no fair-minded thinker can deny that Professor Patten has vividly brought out important differences between our civilization and any past régime, has called attention to the inevitableness of readjustment, has offered illuminating interpretations of our standards and ideals and has made many wise and stimulating suggestions for practical effort.

GEORGE E. VINCENT.

UNIVERSITY OF CHICAGO.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

The Family: An Ethnographical and Historical Outline with Descriptive Notes. Planned as a Text Book for the Use of College Lecturers and of Directors of Home Reading Clubs. By Elsie Clews Parsons, Ph.D. New York and London, G. P. Putnam's Sons, 1906.—xxv, 389 pp.

This volume is a series of lecture outlines upon the subject of the family in evolution. It discusses such important topics as the sexual relations exclusive of marriage, sexual choice, parental power and the duration of parental care among mankind, betrothal and marriage ceremonials, kinship metronymic and patronymic, the economic relations of husband and wife, concluding with a discussion of the modern simple family and a chapter of general ethical considerations.

Attached to each lecture are four sets of notes: the first containing classified references to fuller discussions; the second, brief summaries of theory omitted from the text but having a bearing upon the several topics; the third, offering further suggestions for original research on the part of the more mature student; the fourth, made up of condensed illustrative data which may be utilized by instructor or investigator.

The attempt of the author to subject the family to careful scientific examination is exceedingly praiseworthy and altogether helpful. And there will be no question in the mind of the reader that the work has been courageously and honestly done. As a broad-minded piece of inductive research it is worthy of imitation in other fields.

The book will probably stand as one of the many single and helpful pieces of inductive sociological study. The author's hope that it may be employed as a text-book in sociology either for college lecturers or students is likely to be disappointed. It is too narrowly special for that. It is to be presumed that most college lecturers prefer to make up their own particular outlines upon a given topic rather than to depend, like some of our clerical friends, upon the purchased analyses of other minds. To college lecturers upon the theme of the family, Mrs. Parsons' book will be only one of the valuable sources of material. A general college course in sociology in our time must necessarily be of far wider interest than this book. There is already in existence a splendid body of clear and simple sociological theory to be surveyed by the student, and the inductive fields for the practical illustration of the theory are many and broad. The family is only one of these fields—an important one, to be sure, but, after all, only one.

Her work is also delicately recommended by the author as a text-book for intelligent mothers who desire to fit their daughters for useful

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

and joyous womanhood. The removal of the primitive taboo upon the discussion of sexual matters and relations is a consummation devoutly to be wished, but here again it is probable that intelligent mothers can find the exact material for their purpose in a more compact and effective form. The value of the work as a piece of research is unquestioned. Its value as a text-book for any purpose is, to say the least, problematical.

In the closing chapter upon ethical considerations and elsewhere in the book there are practical suggestions of great importance. For example, proper emphasis is laid upon the fact that there are clearly two sides to what may now be spoken of as the presidential theory of race-suicide. Progressive diminution of offspring is a great gain to any species. The vital drain upon the parent is lessened. The size and capacity of the smaller number of offspring are increased. The higher forms of parental care may be lavished upon the few instead of being scattered among the many. While childless marriages and abnormal restriction of child-bearing by the superior economic classes is a peril, the principle of voluntary control of the birth rate is a sound principle. The *laissez-faire* argument that natural selection will bring things out all right is fallacious. Natural selection is failing to improve the human breed as it ought. What is needed is a voluntary social control of the birth rate, not only in the higher but much more also in the lower strata of the population. Educational agencies should teach these classes that reproduction irrespective of circumstances or consequences is criminal and not righteous; and, among the diseased and defective and vicious classes, society should make reproduction impossible. A rational program for the improvement of the human breed is a fundamental necessity. There must be fit biological preparation for any social democracy that will be worth while. In this connection the author happily calls attention to the social meaning of the emancipation of woman, to the fact that her economic independence gives her a selective power in the choice of a mate which has heretofore been lacking. This opinion finds practical and suggestive confirmation in the observation of Judge Stevens of the 9th Judicial Circuit, Wisconsin, that the great majority of divorces in that state occur where the wife is still economically dependent, where she has bartered herself for life support.

There is one logical conclusion to which the author thinks she is driven after a survey of the facts, which has attracted more popular attention than any other part of the book. It is deserving also perhaps of some critical attention, because it is the only really novel

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

reform suggested in the treatise. This is the now somewhat notorious doctrine of the trial marriage. It is presented in a single paragraph not too long to quote. After remarking that sexual choice is a very important matter, needing mature judgment and therefore preclusive of very early marriage, the author continues:

> Hitherto, in almost all societies late marriage has either been accompanied by a lack of chastity before marriage on the part of the youth of both sexes, or, where female chastity is valued, by the lack of chastity on the part of the male, with the growth of a prostitute class. Now it is unnecessary to more than point out that modern democracy is as incompatible with prostitution as with slavery. . . . We have, therefore, given late marriage and the passing of prostitution, two alternatives—the requiring of absolute chastity of both sexes until marriage or the toleration of a freedom of sexual intercourse on the part of the unmarried of both sexes before marriage, *i. e.*, before the birth of offspring. . . . It would therefore seem well, from this point of view, to encourage early trial marriage, the relation to be entered into with a view to permanency, but with the privilege of breaking it if proved unsuccessful and in the absence of offspring, without suffering any great degree of public condemnation.

Perhaps the first reflection which occurs to the reader is that the discussion at this point is decidedly cursory and lacks a good deal of that thoroughness which the seriousness and importance of the matter demand. And upon second thought it occurs to one that the practice of the trial marriage is not altogether new even in the pages of Mrs. Parsons' work. Considerably earlier in the volume we are told that among the Yahgan it is not unusual to see a girl change her husband several times before a child is born, and that, among these primitive people, marriage appears not to be thought of as binding before the birth of a child. Of course, this lowly genesis of what may be a great social discovery is not to be urged against it, but on other grounds one cannot help thinking that the public mind is quite right in introducing a decided *non sequitur* at this point in a chimerical argument.

It is the old story of utopian socialism over again. A change in human organization will effect a change in human nature. Sometimes, but not necessarily. Passions and desires are more fundamental than institutions, and our moderately strict institution of marriage, with all its defects, is not the cause, but the natural result of licentiousness, selfish passion and weak will. In the matter of marriage and divorce we are dealing with fundamental instincts as we are in everything else that is human. The problem is not primarily one of substituting some

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

beautiful theoretical form of youthful trial marriage for the institution we now have, but rather one of wisely regulating and controlling certain fundamental instincts. The reason for the extraordinary number of divorces in the United States is not only the growth in the mature decency and spirit of American women, but is also due to a raw and impulsive early outlook upon marriage and a deep lack of an early sense of moral responsibility on the part of great numbers of our population. We have never yet tried in this country to teach the facts which contribute to sexual and marital self-control. False modesty and a lack of frankness have been in the way. The whole subject has been taboo too long. Society has never recognized in any practical way that it had an interest in this sphere. Rational modifications of the system of marriage and divorce are good, but what is probably needed far more is a sound and thorough-going ethical training in the home, in the school, in the church, in sexual and marital relationship and responsibility.

The evils of marriage and divorce will work out slowly with the progressive growth in self-control, with the inhibitive regulation of certain primal instincts. The youthful trial marriage is not evolutionary liberality of doctrine but revolutionary. It is like prescribing a trial Kentucky camp-meeting of the old days for the cure of the devotee of the religious orgy. The typical revival camp-meeting is an institution for the spread of contagion and weakens mental and moral character. Trial marriage would have about the same effect in the process of sexual and marital evolution. There is no reason to suppose that education in responsibility would result.

The ecclesiastical view, with all its narrowness and impossibleness without modification, is ethically and pedagogically sound at the root—"till death us do part." Education in home making, and legislation that will make it necessary for young men and women to stop and think, are the first steps in genuine marriage reform. And then a further step may be safely taken, and a greater legal freedom than hitherto, to which social experience and not ecclesiastical dogma will set the limits, may be granted in the direction of absolute divorce and the privilege of both parties to re-marry after a certain period has elapsed. Trial marriages and trial divorces are equally obnoxious to sound social sentiment and intelligence.

FREDERICK MORGAN DAVENPORT.

HAMILTON COLLEGE.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

RECORD OF POLITICAL EVENTS

[From May 1 to November 5, 1907.]

I. INTERNATIONAL RELATIONS.

PEACE CONFERENCE.—The second International Peace Conference met in the Hall of Knights at The Hague on June 15, with nearly fifty countries represented, including those of Latin America. M. Nelidoff (Russia) was chosen president, and at the second session on June 19 the detail work of the conference was apportioned among four special committees with the following chairmen: (1) on arbitration, M. Bourgeois (France); (2) on usages of land warfare, M. Beernaert (Belgium); (3) on usages of naval warfare, Count Tornielli (Italy); and (4) on private property at sea, contraband of war, blockades and merchant marine, M. de Martens (Russia). Many proposals were submitted by the delegates, and in a series of eleven plenary sessions extending to October 18 the following conventions were agreed upon, the right to sign them being left open until June 30, 1908: (1) the peaceful regulation of international conflicts; (2) providing for an international prize court; (3) regulating the rights and duties of neutrals on land; (4) regulating the rights and duties of neutrals at sea; (5) covering the laying of submarine mines; (6) the bombardment of towns from the sea; (7) the collection of contractual debts; (8) the transformation of merchantmen into warships; (9) the treatment of captured crews; (10) the inviolability of the postal service; (12) the application of the Geneva Convention and the Red Cross rules to sea warfare; and (13) the laws and customs regulating land warfare. The subject of disarmament was dismissed by a resolution of August 17, declaring "it is highly desirable that the governments should resume the serious study of the question of limiting armaments." The American proposal for a permanent international "court of arbitral justice," to have jurisdiction in certain matters, the arbitration of which would be compulsory, though ably championed by Mr. Choate, failed of adoption, largely because of the insistence of the lesser powers, particularly Brazil, on the principle of equal representation in the court; and the conference contented itself with an expression of adherence to the principle of international arbitration. The British proposal for the abolition of contraband failed of passage, the opposition including Germany, France and the United States; but Great Britain has announced her intention of preparing a convention, according to which those states that may support her proposals shall agree that in cases of hostilities in which they may be involved with one another they "will exercise the right of search only in order to establish the neutral character of the vessels." The conference also had to register the failure of its third committee to arrive at

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

any adequate regulations as to submarine mines. On the other hand, the American proposal to prohibit the use of force in collecting contractual debts was adopted, as well as the German proposal for the creation of an international prize court. The conference adjourned after thanking the president of the United States, the czar and the queen of Holland, and approving a *vœu* with regard to the meeting of the next conference. The European press, which has severely criticized the conference, explains its failure to accomplish more by lack of preparation, by rivalry between the great powers, especially Great Britain and Germany, and by the jealousy of the lesser powers.—The president of the conference refused to receive a Korean deputation, consisting of Prince Tjying Chiyi and two others, who arrived in June to protest against the non-invitation of Korea and the violation of Korean sovereignty by the Japanese.—The corner-stone of the Carnegie Palace of Peace at The Hague was laid on July 30.—General arbitration treaties were negotiated and signed at the conference between Italy and Argentina and between Italy and Mexico.

MINOR INTERNATIONAL CONFERENCES.—The International Red Cross Conference was held at London, June 13–15.—The permanent committee of the Brussels Sugar Convention adopted an additional act on July 27, extending the sugar agreement of 1902 for five years from September 1, 1908, and providing for the ratification of the same before February 1 next.—The international conference held at the British Foreign Office in June to discuss measures for dealing with the sleeping sickness in Africa, adopted resolutions in favor of international action.—The Anti-Alcohol Congress, held in Sweden in August, decided upon the establishment of an international bureau at Lausanne. The next Congress will be held at London in 1909.—The eighth Zionist Congress was held at The Hague in August.—At the International Socialist Congress, opened at Stuttgart, Germany, on August 18 under the presidency of Herr Singer, a violent debate occurred between Herr Bebel and M. Hervé, the French anti-militarist. A British delegate was expelled by the local authorities for remarks derogatory to the government and the Peace Conference.

EUROPEAN INTERNATIONAL RELATIONS.—In June agreements were signed between **Great Britain, Spain** and **France** for the maintenance of the *status quo* in the Mediterranean and the Atlantic as regards the freedom of intercourse of the contracting parties with their respective possessions.—Foreign Minister Pichon took occasion on the unveiling of a statue of Garibaldi at Paris on July 14 to lay stress on the close friendship between **France** and **Italy.**—In the same month, Baron Ahrenthal and Sr. Tittoni, foreign ministers respectively of Austria and Italy, conferred at Desio and announced their steadfast adherence to the **Triple Alliance.**—An attack on the **Franco-Russian alliance** by the *Novoe Vremya* elicited a counter-demonstration from all the other leading Russian journals.—The expected **Anglo-Russian** *rapprochement* appeared in the form of a treaty, signed at London on August 31 and ratified at St. Petersburg on September

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

23, harmonizing the rival interests of those powers in Asia. By the terms of the treaty, Great Britain secures what is virtually a protectorate over Afghanistan and withdraws from Tibet, while in Persia the former rivals have agreed to remain each within a definite sphere of influence. This Anglo-Russian *entente* was hailed in Paris with particular satisfaction.—A political character has been attached to several conferences between rulers during the summer months: Emperor William and Czar Nicholas conferred at Swinemünde, August 3–6; and King Edward met Emperor William at Wilhelmshöhe on August 14, Emperor Francis Joseph at Ischl on August 15, and M. Clemenceau, the French premier, on August 21.

MOROCCO.—The gravity of the Moroccan situation has increased since the June record. Mulai Hafid, the sultan's brother and viceroy of southern Morocco, was proclaimed sultan at Murakesh late in May by the surrounding tribes, and in August announced his intention of taking the throne and of living on friendly terms with the European powers. He was promptly joined by all the important kaids of the south and was crowned at Mogador on September 24. Abd-el-Aziz meanwhile had left Fez for Rabat in order to collect an army; and in the first conflict between the rival sultans, which took place on October 17 at Hettat, the commander of Abd-el-Aziz's first division was defeated and captured. Envoys seeking the recognition of Mulai Hafid by the European powers arrived at London on October 11, but, on the refusal of the British Foreign Office to receive them, left for Berlin. Premier Maura announced on October 22 that France and Spain would recognize only Abd-el-Aziz as sultan of Morocco.—In the meantime, Raisuli has been unusually troublesome in the mountains of the north. On July 1 he seized Kaid Sir Harry Maclean, while negotiating a treaty with him on behalf of the sultan, and, despite the protests of the British government and repeated military expeditions of the shereef of Wazan, Maclean is still kept a prisoner in a village of the Khamas tribe. As terms of his release, Raisuli demands protection for himself, appointment as pasha of northern Morocco, an indemnity of half a million dollars and the release of all mountaineer prisoners. In view of the sultan's inability to cope with Raisuli, France offered in October to interfere in behalf of Sir Harry Maclean.—There have also been renewed attacks on Europeans. On July 30 five Frenchmen, two Spaniards and an Italian were massacred by tribesmen at Casablanca. The French cruiser "Galilée" landed 75 marines on August 4 to protect the consulates, and in the fighting which ensued, including a naval bombardment of Casablanca, about 200 Moors were killed. The French force, since reinforced to the number of 3000 under General Drude, has restored order in the town and is now engaged in pacifying the neighboring districts. Spain is coöperating with France in the Casablanca expedition and on October 14 recalled her commander, General Santa Olallo, because of his differences with the French general. France and Spain have recently proposed to the Algeciras signatories the appointment of an international commission to determine the amounts

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

of the indemnities to be demanded of Morocco for the Casablanca massacre and also for the damage sustained from pillage and the costs incurred in the repression of the disturbances.—On account of these various difficulties, the provisions of the **Algeciras Convention** are being executed very slowly. European officials took over the Moorish custom-houses on July 9; and arrangements are now completed to install Franco-Spanish soldiers as police in the Moroccan ports, pending the organization of native contingents.—M. Regnault, the French minister, was well received by the sultan at Rabat on October 7. The uncertain attitude of Germany toward the situation in Morocco is the subject of much discussion.

ASIATIC INTERNATIONAL RELATIONS.—**Japan** has strengthened her position in the East by treaties with France and Russia. The Franco-Japanese treaty, signed at Paris on June 10, guarantees the integrity and independence of China, the policy of the "open door," and mutual support for the maintenance of the territorial *status quo* in the Far East. An accompanying declaration affirms the most-favored-nation treatment between French Indo-China and Japan. The Russo-Japanese treaties, negotiated in accordance with the Portsmouth convention and finally published in September, embrace guarantees similar to those of the Franco-Japanese treaty, and in addition an agreement concerning the operation of the Chinese Eastern and South Manchurian Railroad and a fishery arrangement for twelve years.—Japan, moreover, has tightened her hold on **Korea**. As a result of the despatch of the Korean delegation to the Peace Conference at The Hague (p. 749 *supra*), the Japanese government practically forced the abdication on July 19 of the Korean emperor in favor of the crown prince, and the conclusion of a new convention whereby the administration of Korea is henceforth placed under the Japanese resident-general. Marquis Ito announced that the Korean troops would be disbanded and replaced by Japanese troops. The attendant disturbances at Seoul were quelled with a loss of 800 insurgents killed and several thousand wounded. The Korean delegates to The Hague, now under sentence of death, are seeking assistance in Europe and America against Japan. Korea was visited by the Japanese crown prince in October.—Japan notified the Postal Bureau at Berne about July 1 that she had opened parcel-post-offices in 41 towns in Manchuria. This action is said to have created strained relations between Japan and **China**.—There was considerable tribal fighting on the frontier between **Persia** and **Turkey**, and the two countries issued contradictory explanations. It was reported in October that two million dollars had been subscribed to assist the Persian government in maintaining a force sufficient to expel the Turkish troops from Persian territory. (For the Asiatic agreement between Russia and Great Britain, see pp. 749, 750 *supra*.)

THE UNITED STATES AND THE JAPANESE QUESTION.—The antagonism between Americans and Japanese, connected in part with the San Francisco school question (see last RECORD, p. 359), has continued but there have been no serious incidents. On May 23, there was a small

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

riot in a Japanese restaurant and a bath house, but Governor Gillett, of California, stated that it was the result of trouble between union and non-union workmen. The Japanese Association of the city protested, however, and asked for special police protection. Furthermore the city was sued for damages incurred in the disturbance. In Japan, a movement looking toward retaliation in the form of boycott was projected. A joint meeting of the seven chambers of commerce in Tokio united in a memorial against the treatment of the Japanese in San Francisco, and the chambers of commerce in important Japanese cities concurred in a letter of remonstrance to the New York chamber of commerce. In July Japanese dispatches announced the appointment of two special commissioners to investigate the situation on the Pacific coast. On May 23 it was reported that official action had been initiated by the Japanese foreign minister in requesting Aoki, the ambassador at Washington, to confer with Secretary Root on the question of protecting Japanese subjects in California, and about the same time it was stated that Secretary Root was endeavoring to negotiate a new general convention to replace that of 1894. The official publication of the Japanese Foreign Office later announced the imposition of heavy restrictions on the emigration of coolies. The whole situation was eagerly exploited by the sensational press of both countries, and in June and July there were continual reports of impending war which found echo in the European papers. No countenance was given to the rumors by the official utterances of either government; and the announcement on July 4 that the United States would send a great fleet to the Pacific waters was not regarded in Japan as an unfriendly movement. The incident may be regarded as practically closed by the visit of Secretary Taft to Japan in September, which was officially stated to have led to the resumption of the negotiations initiated by Secretary Root and designed to place the race question by treaty on a more satisfactory basis. (For similar troubles in Canada, see *infra*, pp. 766, 767.)

OTHER FOREIGN RELATIONS OF THE UNITED STATES.—An agreement was concluded in August between **Great Britain** and the United States to submit the Newfoundland fisheries question (see last RECORD, p. 360) to arbitration at The Hague. Meanwhile, notwithstanding the protests of the colonial government, the *modus vivendi* was renewed in a modified form. It was announced, October 22, that the line of demarkation between the Philippine Archipelago and the British possessions in Borneo and vicinity was uncertain, and that the two governments would have to provide for a delimitation of their respective spheres.—The negotiations on **tariff questions** carried on with European governments for some time have resulted in two positive agreements. On June 1, the president announced by proclamation the conclusion of a commercial agreement between the United States and **Germany** under section 3 of the Dingley act providing for reciprocal concessions. On September 12 a somewhat similar arrangement was made with the **Netherlands**, and during the summer negotiations for a reciprocity agreement with **France** were carried on at

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Paris and Washington.—Ambassador Leishman at Constantinople, on May 15, notified the State Department that the government of **Turkey** had decided to treat American institutions and establishments in that country as on the same footing with those of other foreign nations.—The situation in **Cuba** (see last RECORD, p. 360) has remained practically unchanged, although in the latter part of September the government took extraordinary measures in view of rumors of a new uprising. At the same time disorders occurred in connection with a strike of the trainmen on the railroads. These disturbances have been accompanied by the usual agitation over the question of annexation.—In June the secretary of state refused to recognize the provisional government of **Honduras** by receiving its diplomatic representative.—An effort was made to strengthen the good feeling between the United States and **Mexico** by the visit of Secretary Root in September and October to Mexico City, where he was received in social as well as political circles with the highest honors.—On August 17 Secretary Taft, as mediator, concluded an agreement with the representatives of **Colombia** and **Panama** for the settlement of the issues between those countries and the United States growing out of the separation of Panama and Colombia and the creation of the Canal Zone. Treaties will probably be submitted to the Senate at the next session.—On July 25, the president proclaimed the final ratification of the long-pending treaty with **San Domingo** (see last RECORD, p. 361) which gives to the United States the control of the Dominican customs houses and the administration of the customs revenues.

OTHER AMERICAN INTERNATIONAL RELATIONS.—In consequence of the revision of the **Canadian** tariff (see last RECORD, p. 375), a new commercial agreement with **France** was negotiated by Sir Wilfred Laurier during his visit in July to Paris. France obtains not only the benefit of Canada's minimum tariff but, in the case of certain articles, an important reduction of duties, notably upon wine, in return for which France extends the application of her minimum rates to a number of exclusively Canadian products. The arrangement has received the formal approval of the British government.—By the treaty of Amalpa (see last RECORD, p. 362) with Salvador, which was published late in May, Nicaragua pledged herself to summon a conference of the five **Central American** republics for the purpose of thoroughly adjusting their mutual relations; and the contracting parties agreed to submit any dispute which might arise in the meantime to the arbitration of Mexico and the United States. In June, however, President Zelaya, with the probable purpose of uniting the republics into a confederation under his own hegemony, again attacked Salvador, but with slight success. In September representatives of the five republics signed a protocol accepting the invitation of the United States to meet at Washington at an early date to negotiate, in unison with representatives of Mexico and of the United States, an agreement for the permanent peace of Central America.—On July 1 **Venezuela** completed payment of the British, German and Italian claims under the award of The Hague Tribunal, amounting

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

to over seventeen million bolivars, and began payment of the claims of the deferred creditors. Early in July the government announced its intention not to accept the award of ten million francs to Belgian creditors because of the subsequent discovery of new evidence in the case, but promised to submit the claims anew to arbitration. The matter is now under negotiation with Belgium. The court at Caracas in August found the Bermudez Asphalt Company, an American concern, guilty of aiding in the Matos revolution and imposed a fine of five million dollars as cost of quelling the revolution. The company has appealed to the superior court.

II. THE UNITED STATES.

THE ADMINISTRATION.—The receipts for the fiscal year ending June 30 were $663,140,434.05 and the expenditures $578,903,747.75, leaving a surplus for the year of $84,236,686.30. The cost of federal intervention in Cuba until June 30 was officially placed at $3,330,569.—In August, to facilitate the movement of the crops, Secretary Cortelyou made heavy deposits of government funds in various national banks, especially in New York.—The Tariff Commission, comprising James B. Reynolds, B. S. Waite and Marion DeVries, began their European investigations in September, devoting their attention particularly to methods of determining prices of imported articles.—Secretary of the Interior James R. Garfield seriously disturbed the politicians in May by dropping a large number of *per diem* employees who had been assigned positions for party reasons and by announcing his intention to put the Department of the Interior, especially the Land Office, on a business basis.—Secretary Straus of the Department of Commerce and Labor, issued a call on October 27 for a meeting of representatives of the various boards of trade, chambers of commerce and other commercial organizations to be held in Washington on December 5, for the purpose of formulating plans as to the best methods to be employed in advancing American commercial interests abroad.—In August the Bureau of Immigration and Naturalization, established July 1 under the authority of the last Congress, inaugurated an employment office. Information regarding the demands for labor in various parts of the country is to be obtained by circular letters and will be made public through periodical bulletins. This departure was opposed by Samuel Gompers and other labor leaders on the ground that it would be used to aid the breaking of strikes.—In October, Attorney-General Bonaparte held that it was unlawful for a state commission to induce immigration by promises of specific employment.—The first autumn meeting of the Cabinet was held on October 25, when propositions to increase the naval expenditure, to widen the Panama canal locks and to build new battleships were considered.—The following important **appointments** have been made: Pearl Wight of New Orleans to be commissioner of internal revenue; Frank A. Leach of San Francisco to be director of the mint; Frank Pierce of Salt Lake City to be first assistant secretary of the interior; Edward M. Morgan to be postmaster

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

at New York City. Charlemagne Tower, ambassador at Berlin, has asked to be retired next spring.—The federal government has continued its investigations of **land frauds.** A large number of suits are being filed against companies that have fraudulently obtained land and timber, especially in New Mexico, Wyoming, Colorado and Oregon. John A. Benson and Edward Perrin were convicted in a federal court at San Francisco on August 19 of conspiracy to obtain by fraud 12,000 acres of government land in California. Senator Borah, charged with illegal operations in Idaho, was declared not guilty on October 2. The Denver newspapers in July published a long list of prominent Milwaukee and St. Louis citizens indicted for obtaining coal lands illegally.—In two speeches, one at Indianapolis on May 30 and the other at Provincetown on August 20, Mr. Roosevelt outlined **the presidential policy** with regard to railways and corporations. In his first address he recommended the amendment of the law so that railways might be permitted and encouraged to make reasonable traffic arrangements; deprecated sweeping attacks on property values; and declared that it was inadvisable for the government to undertake the physical operation of the railways. In the second speech he advocated a national incorporation law for companies engaged in interstate business; expressed the hope that future legislation, while increasing the supervisory and regulatory power of the government, would permit such useful combinations as might be made with absolute publicity under the approval of the government; and declared himself in favor of social legislation for workingmen employed in interstate commerce, especially an employers' liability law. He likewise advocated an enlargement of the powers of the federal government to protect the national health. In his tour of inspection over the waterways of the Middle West in October, President Roosevelt made many speeches in favor of deepening rivers and constructing docks, harbors and such other improvements as would advance internal navigation.—On September 4 Colonel Goethals reported to the president that the excavations for the **Panama Canal** during the month of August amounted to 1,274,404 cubic yards, thus exceeding all previous records of the United States. In fact the work has proceeded during the summer so much more rapidly than was expected that the appropriations for the fiscal year 1907–08 will fall short of the requirements by about $8,000,000. In order that Congress might have more precise information about the expenditures in the future, it was decided in August that the Committee on Appropriations should visit the Canal Zone in November and report at the opening of Congress in December.

THE DEPENDENCIES.—The election for **the Philippine Assembly** was held on July 30. In spite of the efforts of the party leaders very little interest seems to have been shown in the campaign. There was a total vote of 97,803, only a small proportion of the entire number entitled to vote, and the independence party, composed of Nationalists and Independents, won a majority of the seats. The Assembly was opened at Manila on October 16

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

by Secretary Taft, who said in his opening speech that the United States had no intention of disposing of the islands; that in his belief the Filipinos would not be fit to govern themselves for at least a generation; and that in his opinion they were aware of their responsibilities and of the necessity of supporting the American government. While not making any specific recommendations on the subject of legislation, he advised the assembly to pay particular attention to the civil service. Sergio Osmena, the former governor of Cebu and a Nationalist, was elected president. Owing to the growth of the independence movement the government prohibited the display of revolutionary flags under heavy penalties.—Señor José de Diego, speaker of the **Porto Rican** House, on his visit to Washington in July made a special plea for citizenship and an elected Senate.

THE FEDERAL JUDICIARY.—In the case of the Atlantic Coast Line Railroad Company *v.* North Carolina the Supreme Court held valid an order of the state railroad commission requiring a company so to arrange its schedule as to furnish transportation between two points making connection with through trains. In another due-process case, Buck *v.* Beach, the court declared unconstitutional a state law taxing notes actually within a state in which the owner was not resident.—The powers of the Interstate Commerce Commission have been interpreted by decisions and dicta in the case of the Cincinnati, Dayton and Hamilton Railroad *v.* the Interstate Commerce Commission and in that of the Illinois Central Railroad *v.* the Interstate Commerce Commission.—In the case of Ellis *v.* the United States the court held that the act of 1892, limiting the hours of laborers and mechanics employed by the United States or its contractors, was valid, but that persons employed on dredges and scows in dredging harbors and channels were not within the compass of the act.—In the case of Georgia *v.* the Tennessee Copper Company the court enjoined a corporation in one state from sending poisonous fumes into another.—There have been two important **insular cases**. According to the decision in Grafton *v.* the United States the constitutional prohibition of double jeopardy obtains in the Philippines, and a soldier tried for murder and acquitted by court martial cannot be tried again by a civil court. In the case of the United States *v.* Heinszen and Company the court held valid the act of Congress of June 30, 1906, legalizing the imposition of duties by the president prior to March 8, 1902.—In a case brought by the United States Rubber Company, a New Jersey corporation, against a Colorado shoe firm, the United States circuit court of appeals, on October 25, declared invalid a Colorado statute prohibiting any foreign corporation from prosecuting or defending a suit in that state unless it has paid an annual license fee.

STATE AFFAIRS.—Senator Morgan dying in June and Senator Pettus in July, John H. Bankhead and Joseph F. Johnston were chosen to represent **Alabama** in the United States Senate.—A prohibition bill for the state of **Georgia** was signed by Governor Hoke Smith on August 6 and will go into effect on January 1, 1908. A week later the legislature of the state

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

passed a new suffrage law, providing that a voter must possess one of the following five qualifications: military record, descent from a person possessing a military record, good character coupled with an understanding of the duties of citizenship, ability to read the constitution, or a certain amount of property. It is estimated that the law will disfranchise 95 per cent of the negroes.—The paramount issue in the **Maryland** campaign, according to the Republican platform, was a fair and uniform election law. The Democratic party, however, took a strong stand against illiterate negro suffrage and declared in favor of direct nomination of United States senators.—The **Massachusetts** legislature in June passed a bill designed to prevent the proposed merger of the Boston and Maine Railway with the New York, New Haven and Hartford until specific authority should be given. The state Democratic convention, held in Springfield in October, split, and two tickets, one headed by Henry M. Whitney and the other by Charles W. Bartlett, were adopted. The Whitney ticket was later declared to be official by the ballot commission.—In May the **Michigan** Senate passed a resolution demanding that President Roosevelt be chosen for a second elective term.—The primary election contest in **Mississippi** in August over the nomination of a United States Senator resulted in a victory for John Sharp Williams.—During the summer a select committee of the **New Jersey** legislature conducted an examination into the administration of the departments of the state. A proposal to establish a public-utilities commission was rejected by the legislature, but the reform of the primary laws and the state supervision of public-utility corporations were made issues in the campaign.—The **New York** legislature, in a long session and an extra session (see last RECORD, p. 370) marked by a sharp contest with Governor Hughes, passed three important measures: a public-utilities bill establishing two commissions, one for New York city and another for the remainder of the state, charged with the supervision and investigation of public-service corporations; an act providing for a recount of the ballots cast in the Hearst-McClellan municipal campaign of 1905; and an act reconstructing a few of the state senatorial districts. The direct-primaries bill and the teachers' salary bills failed to become law. The governor vetoed a number of measures.— The Republican state central committee of **Ohio** endorsed W. H. Taft for the presidency on July 30.—The **Oklahoma** election (see last RECORD, p. 371) was held on September 17 and resulted in the adoption of the constitution and of prohibition and in a general victory for the Democrats. About a week later it was announced that in spite of his objections to the constitution the president would not attempt to block the admission of Oklahoma to statehood.—The commission charged with investigating the state capitol scandal in **Pennsylvania** (see last RECORD, p. 370) reported to the governor on August 16, naming eighteen persons involved in irregular transactions and recommending criminal or civil suits against them. The commission stated that goods costing $1,574,399 were sold to the state for $6,434,748. On September 18, fourteen of

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

the leaders of the affair were arrested on criminal charges in thirty-two cases and ten of them were indicted by the Dauphin county grand jury.—The Republican caucus in **Wisconsin** nominated, on May 16, Isaac Stephenson, the richest man in the state, to succeed Senator Spooner. In July the legislature placed the control of public utilities in the hands of the state railroad commission but followed this by passing a two-cent-rate law.

MUNICIPAL AFFAIRS.—A new charter for **Chicago** was passed by the Illinois legislature in May, but was rejected by a large majority at a poll held in the city on September 17. It was opposed by the labor party, which objected to the diminution of the representation of certain districts in the state legislature, and also by many tax-payers who feared the possibilities of increased taxes under the new limit provided.—Special significance was given to the municipal campaign in **Cleveland** by the nomination for mayor of Congressman Burton, strongly supported by President Roosevelt, against Tom L. Johnson.—The Public Service Commission for **New York City** appointed by Governor Hughes (see STATE AFFAIRS) with William R. Willcox as chairman was organized on July 2, and five days later it issued its program of procedure, stating that its first work would be the collection of precise information on the service supplied by the street-car lines and electric railways. William M. Ivins was appointed counsel to assist in the inquiry, which began with an investigation of the Interborough and Metropolitan systems. The commission found it necessary not only to examine the current accounts of the companies but also to go into the history of their organization and development. The inquest revealed unexpected examples of irregular financing, such as charging unwarranted expenditures to the construction account of the subway to be borne by the city. It was discovered that no less than $750,000 had been paid out to politicians to "accelerate public opinion" in favor of certain interests, and that questionable methods had been employed by promoters in their endeavors to secure a monopoly of transportation. Nearly all of the financiers connected with the New York transit systems were found to be involved in transactions which it was difficult and inconvenient for them to explain. In addition to revealing these scandals, the commission has published an appalling record of fatalities. It has also issued orders designed to increase transportation facilities in the city.—Arthur H. Masten, master in chancery of the federal circuit court, submitted on May 21 a report against the constitutionality of the eighty-cent-gas law, and Judge Hazel announced on October 21 that he was ready to hear argument on the acceptance of the report.—An investigation into the conduct of the office of the president of the borough of Manhattan, James Ahearn, has been made, and his trial is now going on before the governor.—The drivers of the Street Cleaning Department struck on June 26 against overtime work and against the system of fines imposed for infractions of the department's rules, and notwithstanding the menace to the health of the city a settlement was not reached until July 2.—By an ordinance signed July 1 the city of

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Philadelphia assumed the management and supervision of the Rapid Transit Company, which controls all the street railways, and at the expiration of fifty years the city is to become the sole owner of the entire traction system.—The Carmens' Union in **San Francisco**, early in May, voted a strike on all of the street-car lines to procure pay at the rate of three dollars for an eight-hour day, and the entire transit system was at once tied up. —The prosecution of Mayor Schmitz and Abraham Ruef (see last RECORD, p. 371) received a startling turn on May 16, when the latter withdrew his plea of not guilty and entered a plea of guilty to the charge of extortion, announcing at the same time that he would do all in his power to assist the reformers in their campaign against municipal corruption. Among other things, Ruef testified that the United Railroads Company had paid $200,000 for its franchise, of which he had received $61,000. On May 21 the grand jury returned indictments against Patrick Calhoun of the United Railroads, Mayor Schmitz, Louis Glass of the Pacific States Telephone and Telegraph Company, and others. Schmitz was found guilty on June 13, removed from office four days later and sentenced to five years' imprisonment on July 8. Edward R. Taylor was commissioned mayor on June 17. The continuation of the reform movement was the leading issue in the municipal campaign, and prosecution of offenders is still in progress. —The city election in **Toledo** turned on the question of granting new privileges to the Traction Company, Mayor Whitlock heading an independent movement against a renewal of the company's franchises.—During the summer final reports on **municipal ownership** were made by the committee of investigation representing the Civic Federation. An immense body of facts on public ownership in Great Britain and the United States was brought together, but as the committee did not agree on the interpretation of the facts, those favoring municipal ownership and those favoring private ownership made separate summaries.

THE ELECTIONS.—The entire Republican state ticket in Kentucky, headed by A. E. Wilson for governor, was elected, and the Democratic majority in the legislature was considerably reduced.—The Democrats in Maryland elected Austin L. Crothers for governor and all the remaining candidates on the state ticket.—The Republicans carried Massachusetts by the largest majority since the free silver campaign, giving Governor Guild a plurality of over 100,000.—E. F. Noel and the entire Democratic ticket were elected in Mississippi.—The Republicans of Nebraska elected M. B. Reese justice of the Supreme Court and H. T. Clarke railroad commissioner.—John F. Fort, Republican candidate for governor in New Jersey, was elected.—E. T. Bartlett and W. Bartlett, candidates for associate judges of the Court of Appeals on the Republican and Democratic tickets in New York, were elected by large majorities. The Republicans again have a majority in the Assembly.—J. O. Sheatz, the Republican candidate, was chosen treasurer of Pennsylvania.—The Democratic governor of Rhode Island, J. H. Higgins, was reëlected.—In Boston, District Attorney Moran

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

was reëlected on the Independence League ticket.—The Republicans won the mayoralty contest in Cincinnati.—Tom L. Johnson, the Democratic candidate, was chosen mayor of Cleveland for a fourth term.—The aldermanic election in New York went Democratic; the Democrats were likewise victorious in New York County against the fusion ticket of the Republicans and Independence League.—The anti-Mormon candidate in Salt Lake City was elected by the largest plurality ever given.—Edward R. Taylor, candidate for mayor of San Francisco on the Democratic and good-government ticket was elected.—Brand Whitlock, representing the municipal reform movement, was reëlected mayor of Toledo.

THE TRUST PROBLEM AND THE RAILWAYS.—Herbert Knox Smith, the commissioner of corporations, submitted to the president in May an elaborate report, showing that the **Standard Oil Company** had secured control of the entire oil trade, first by discrimination in its favor on the part of the railways, secondly through control of the pipe lines, often by wrongful means, and thirdly by unfair selling methods. This report was supplemented in August by a second installment, replying to the claim of the company that it had reduced prices and reiterating the charge of unfair practices in obtaining preferential railway rates. After a long and searching examination of witnesses, including John D. Rockefeller, Judge K. M. Landis of the federal district court at Chicago on August 3 fined the Standard Oil Company $29,240,000, representing a maximum fine of $20,000 on each of 1462 counts in ten indictments, charging the acceptance of rebates amounting to $223,000 from the Chicago and Alton Railway on the shipment of 6000 cars of oil from Whiting, Indiana, to East St. Louis. Some days later Judge Grosscup of the federal circuit court of appeals allowed a writ of error. For giving information which led to the conviction of the Standard Oil Company the Chicago and Alton Railway Company was granted immunity. On September 18 an action of the federal government to dissolve the Standard Oil Company was begun before Ex-Judge Ferriss, a special examiner of the United States court in New York city. The federal grand jury for the western district of New York, which adjourned on September 6, brought indictments against the Standard Oil Company and the Pennsylvania and the New York Central railway companies, containing sufficient counts to make possible a fine of more than $18,000,000. A similar indictment was brought in July by the federal grand jury for the west district of Tennessee, containing counts enough to entail, in case of conviction, a fine of $30,000,000. Actions have likewise been brought against the Standard Oil and subsidiary companies in several of the states, including Missouri, Mississippi and Texas.—On July 10, the federal government began an action against the **American Tobacco Company** in the United States court in the city of New York, seeking to dissolve the tobacco merger and to prevent every operation in tobacco in restraint of trade. The prosecution recommended that the court appoint receivers to take possession of the assets of the sixty-five concerns involved and if necessary

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

wind them up. The trust filed an answer on October 7, accepting the facts alleged by the attorney-general but traversing his interpretation of them. On October 21, under a provision of the anti-trust acts not previously utilized, several thousand packages of cigarettes belonging to the tobacco trust were seized on the order of the attorney-general. In Delaware in July action was initiated against the **powder trust**, and in Pennsylvania in June against the **anthracite coal monopoly** and the **umbrella trust**.—In August, Judge K. M. Landis issued a perpetual injunction restraining the **furniture trust**, the American Seating Company, from operation.—Attorney-General Bonaparte announced in August that the conviction of a few prominent men would be better than mere litigation, and that receivers should be appointed for convicted corporations until they paid their fines.—There has apparently been no diminution in the fervor of **state action against trusts**. Several new and radical laws went into effect in Texas on July 13, covering practically every sort of combination in restraint of trade and going even so far as to provide penalties for agents selling goods made by trusts. A new law required insurance companies to invest 75 per cent of their Texas earnings within the state, and under this measure several of the companies announced their withdrawal from the state.—A somewhat radical departure was made in Toledo, Ohio, in July, when twenty-one members of the Lumber Dealers' Association, nine members of the Brickdealers' Association, and two bridge agents were given jail sentences for violating the anti-trust laws of the state.—A conference of the attorneys-general of thirteen states, which was held in St. Louis in September to consider the best methods of enforcing anti-trust legislation, recommended among other things a federal law prohibiting the federal circuit courts from issuing orders restraining state officials in the prosecution of trusts, thus allowing appeals to be taken only from the decisions of the highest state courts.—A Civic Federation conference on trusts, held in Chicago the third week in October, adopted a final resolution approving the moral effect of the enforcement of the Sherman Act but recommending the creation of a non-partisan commission, to carry on an investigation and to report to Congress proposals which will permit of certain agreements, now interdicted, on the part of corporations, farmers and labor unions.—The long expected report of the Interstate Commerce Commission on the **Harriman system** of railways and steamships (see last RECORD, p. 372) appeared on July 13, and while it did not recommend any legal action against Mr. Harriman it condemned his methods and advised new laws for curbing railway speculation. Mr. Harriman denounced the report as "a political document and a personal pursuit of me."—Under the provisions of the Hepburn Act, the commission promulgated a uniform system of accounting to be followed by all the railways after July 1. A detailed monthly report of earnings and expenditures is required from each company.—On October 14, Franklin K. Lane, Interstate Commerce Commissioner, made public the charge that the Southern Pacific Railway Company, of which E. H. Harriman is president,

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

had been guilty of repeated violations of the Hepburn Act. In a ruling in May the commission ordered that one carrier shipping supplies and fuel over the lines of another carrier must pay the regular freight rates.—While the federal government was prosecuting its suits against trusts, it was at the same time engaged in pushing actions against railways for **rebating**. On May 7, four indictments were made by the federal grand jury in New York against the Chicago, Milwaukee and St. Paul and the Chicago, Rock Island and Pacific railway companies, which pleaded guilty and were fined $20,000 each. On October 11 the Atchinson, Topeka and Santa Fe Railway Company was found guilty of rebating by the federal court at Los Angeles on counts which, if the maximum rate be imposed, will entail a fine of $1,100,000.—The contest over the **two-cent rate of fare** continues in a number of states. In Illinois the new rate law went into effect in July and the railway companies announced that they would give it a fair trial. The board of railway commissioners in Kansas ordered the railways of the state to establish a two-cent rate by October 1. The legislature of New York passed a two-cent-rate bill on May 23, but it was vetoed by the governor on the ground that such an action was unwarranted, at least until the new public-service commission had made an investigation. The two-cent-rate law went into effect in Michigan on September 17. The railroads in Missouri resisted the rate law, which went into operation in June, and on the 13th secured from the federal court an injunction restraining the state officials from carrying the law into effect. The authorities then attempted to enforce it so far as it applied to business within the state, and in view of the entanglements thus arising the railways agreed to try the law for a few months. The final settlement is still pending. The railways in Pennsylvania likewise resisted the new rate law and the lower state courts in several instances have declared it invalid as violating both the federal and state constitutions. A rate law went into effect in Virginia on July 1 but its enforcement was restrained by an order from the federal circuit court. A temporary working agreement was reached between the railways and the state authorities pending final adjudication. On July 11 the Wisconsin legislature passed a two-cent-rate law.—The attempts to enforce railway rate legislation were attended by **conflicts between the federal courts and the states** of North Carolina, Alabama and Georgia. In North Carolina, where the rate law went into effect on July 1, Judge Pritchard of the United States circuit court issued a temporary injunction ordering the officials not to enforce the law against the Southern Railway Company. The state authorities for a time refused to comply with the order and even resisted federal writs of *habeas corpus*. The state courts moreover continued to impose fines on the company's agents, and in this they were supported by Governor Glenn, who declared that the rights of the state were in peril and that North Carolina would be nothing but a province if the federal courts could interfere with the administration of a criminal law before determining the question of its constitutionality. On July 22, Judge Pritchard

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

declared the penalty clause of the rate bill unconstitutional. Assistant-Attorney-General Edward T. Sanford, at the instance of President Roosevelt, sought to arrange a compromise between Governor Glenn and the railway company, but the governor remained defiant and further indictments were brought against the company's agents. At last on July 28 a *modus vivendi* was reached, the state appealing from Judge Pritchard's order directly to the Supreme Court of the United States and the railway company agreeing to carry its case as rapidly as possible through the state courts and if necessary to the Supreme Court. The litigation is now pending. In Alabama, the action of the Southern Railway Company in applying to Judge Thomas Jones of the United States circuit court at Montgomery for an injunction restraining the state authorities from enforcing the recent railroad legislation was met, on the part of the state, on August 2, by a revocation of the license of the company, under a provision of the law of incorporation authorizing this procedure under such circumstances. The company ran its trains for a few days without a license and the state officials disregarded a federal injunction. On August 8 a compromise was reached, according to which the state restored the franchise and the railway company agreed that the passenger-and-freight-rate acts should go into effect pending litigation in the federal courts. At length on October 21 the railway company agreed to stop litigation and a passenger rate of two and three-fourths cents per mile was adopted. The issues raised in Georgia were similar to those raised in North Carolina and in Alabama.

LABOR AND CAPITAL.—After a long contest over the selection of jurors the trial of William D. Haywood, secretary and treasurer of the **Western Federation of Miners**, for the murder of Governor Steunenberg of Idaho began at Boise City on June 4. The state endeavored to prove a general conspiracy, resting its case principally on the testimony of Harry D. Orchard, who stated that he had committed a series of crimes at the suggestion or with the countenance of the officers of the union. There was little corroborative evidence, and on July 28 the jury returned a verdict of not guilty.—After protracted negotiations, initiated by an ultimatum addressed to the Western Union Company by President Small of the Telegraphers' Union on May 19, a **telegraphers' strike** began in Chicago on August 10. During the second week in August a large number of Western Union operators and some Postal men went out in Chicago, New York, St. Louis, Denver and in all the important cities in the United States. The chief demands of the telegraphers were arbitration of minor differences arising from time to time, an increase of pay and shorter hours. The company's officials refused to concede any of the points and carried on their business with a diminished force. On October 12 President Small sent telegrams to more than one hundred locals urging them to call the strike off on account of shortness of funds. For this action the executive board of the union suspended him, announcing that the strike was to go on. At the close of this RECORD the company is maintaining that the strike is at an end so far

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

as it is concerned, but the operators are appealing for contributions and are endeavoring to continue the conflict.—The longshoremen of the port of New York began on May 2 a strike for an increase of wages, which was attended by some rioting, not of a serious character, and was called off on June 14.—The machinists of the Erie Railway between New York and Chicago went out on May 24, demanding the abolition of piece work. Owing to the refusal of the company to make concessions the struggle has been prolonged until the present time.—The ore-handlers of the United States Steel Corporation at Duluth, Minnesota, struck in July for the abolition of the contract and bonus system, an increase of wages and a recognition of the union. After some local disturbances the strikers returned to work on August 1 without obtaining any concessions.—Among the minor and local labor conflicts during the period under review were the strikes of the trackmen of the New York, New Haven and Hartford Railway Company on May 20; of the longshoremen of Buffalo on the same day; of the machinists of the Louisville and Nashville Railway on May 29; of workingmen and workingwomen of Birmingham, Alabama, on June 1; of the ice-wagon drivers in New York City on June 28; of the trainmen on the Colorado and Southern Railway on August 6; of the New York City packing-house teamsters on August 23; of the dockmen of Galveston, Texas, on September 11; of the longshoremen and teamsters at New Orleans on September 30; of the bookbinders throughout the country on October 2; and of the engineers on the coastwise tugs on October 18. (See also *supra*, pp. 758, 759, under MUNICIPAL AFFAIRS.)—Several unions have demanded the removal of Public Printer Charles A. Stillings on the ground that he has violated the eight-hour law and advocated an open-shop policy. —The labor journals report an unusually large number of sweeping **injunctions.** Especially noteworthy are an order of a Vermont court, in October, restraining members of the Quarrymen's and Millmen's Union from even persuading workmen to leave the employ of the Operators' Association, and an order issued by the federal circuit court at St. Paul, on October 19, enjoining workmen against refusing to handle materials manufactured in non-union shops.—The papers and magazines continue to report cases of **peonage,** and a few companies have been prosecuted since the close of the last RECORD.

THE RACE PROBLEM AND LYNCHING.—A race riot near Yazoo City, Mississippi, on June 8, resulted in the death of three negroes, the whipping of three others and the wounding of four white men. A negro at Crisfield, Maryland, was lynched on July 28 for killing a policeman. In the suburbs of Mobile, Alabama, on September 22, a negro was hanged to a tree, his body riddled with shot, and a card pinned to his breast bearing the legend: "Negroes must be taught that death will always follow attacks on white women." A mob in Cumberland, Maryland, broke open the jail on October 6, took out a negro who, in resisting arrest, had killed a policeman, and kicked him to death. On their confession that they were mem-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

bers of an organized band engaged in robbing stores, three negroes were taken from the jail at Tunica, Mississippi, in October and were hanged. (As regards negro disfranchisement, see Georgia and Maryland, *supra*, p. 756, under STATE AFFAIRS.)

III. LATIN AMERICA.

The Mexican Central Railroad and the National Railroad of **Mexico** were combined in July as the National Railroads of Mexico, the government buying up a majority of the stock.—Sixteen men were condemned to death in June in connection with the attempted assassination of President Cabrera of **Guatemala**.—A revolutionary attempt at Guayaquil, **Ecuador**, in July, failed, and a court-martial sentenced fifteen soldiers to death for participation in a political plot against President Alfaro.—**Chile** was disturbed in June by a cabinet crisis and a complete strike of state railway employees, but President Montt brought both to an end. There was a severe earthquake at Valdivia on June 13.—The imperial pretender, Prince Louis of Orleans, grandson of Pedro II, endeavored to visit **Brazil** in May but was prevented by the government from landing at Rio Janeiro.—At the opening of the **Argentine** Parliament in May, President Figueroa Alcorta called attention to the unexcelled prosperity of the country. In August rioting was reported from the Brazilian frontier, and disorders in the province of Corrientes are now being investigated by Señor Perez, the national Commissioner.—The Chambers of **Uruguay** passed a bill in September abolishing the death penalty. (See also INTERNATIONAL RELATIONS, AMERICAN, *supra*, pp. 753, 754.)

IV. THE BRITISH EMPIRE.

THE UNITED KINGDOM. — The fourth Conference of Colonial Premiers, which met in London on April 15 (see last RECORD, pp. 376, 377) under the presidency of the Earl of Elgin, secretary of state for the colonies, closed on May 14. Subject to the reservation of the imperial government against altering the fiscal system of the United Kingdom, the resolution of 1902 favoring preferential duties was reaffirmed. Proposals looking to more effective coördination of the military forces of the Empire were adopted. The secretary for the colonies promised that the affairs of the self-governing dominions should be separated in his office, as soon as this should seem practicable, from the affairs of the crown colonies. It was decided that in future the conference should be designated as "imperial," not "colonial," that it should meet under the presidency of the British premier, and that a permanent secretariat should be organized.

On May 7 Mr. Birrell brought in the promised government bill to create in **Ireland** a council of 82 elected and 24 appointed members to administer the affairs of the Local Government Board, the Department of Agricultural and Technical Instruction, the Congested Districts Board, the Commissioners of Public Works and of National Education, the Intermediate

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Education Board, the Reformatory and Industrial Schools Department and the Registrar-General's Office. The bill conferred no legislative power on the council, but Mr. Birrell stated that it might pave the way for home rule. The bill was denounced on the one hand by Mr. Balfour and other Unionists, and on the other hand by the Roman Catholic bishops and by the Irish Nationalist Convention, held on May 21 under the presidency of Mr. Redmond, who opposed it as utterly inadequate. The bill was withdrawn by the ministry on June 3. The Nationalist leaders are now advising against further coalition with the Liberals. Several outrages were reported from Ireland during the summer months. A strike of cartmen in Belfast in August was accompanied by so much violence that the city was placed under martial law. The strike was settled on terms mainly favorable to the employers, and while the troops were withdrawn the local garrison was permanently doubled. Mr. Birrell introduced on June 27 a bill to reinstate evicted Irish tenants. In July, the king and queen paid a short visit to Ireland.—The government has taken a decided stand against the **House of Lords**. The prime minister stated on June 7 before the National Liberal Federation Conference at Plymouth that the time for expostulation with that House had gone and it must understand that the people are master. On June 24 he moved in the Commons a resolution that the power of the Lords to reject or alter bills passed by the Commons should be so restricted by law that within the limits of a single Parliament the final decision of the Commons would prevail; that, if a bill passed by the Commons were twice rejected by the Lords, the Commons might pass it over the Lords' heads. A Labor amendment, favoring the abolition of the House of Lords, was rejected 315 to 100, and the resolution was carried 432 to 147. The prime minister opened the campaign, which is now going on against the House of Lords, at a crowded meeting of Liberals at Edinburgh on October 5. He also advocates quinquennial Parliaments.—Mr. McKenna, the Minister of Education, states that, notwithstanding the rejection of the **Education Bill** last year by the House of Lords, the government will press forward another bill with all the resources at its command.

CANADA.—A serious **miners' strike** in the West was ended in May by the adoption of a two-years' agreement with the mine owners.—The growth of **anti-Asiatic labor feeling** on the Pacific coast found expression in Vancouver on the evening of September 7 in a demonstration against Japanese and Chinese. On the 9th the Japanese primary school was set on fire, and was saved only through the efforts of the Japanese. Asiatics were landed by the steamship companies only under military protection. The Dominion Cabinet at once represented to the provincial authorities of British Columbia that the maintenance of the treaty rights of Japanese residents was a matter of imperial duty, and Sir Wilfred Laurier, in conference with Mr. Ishii, the Japanese commissioner, on September 17 expressed his regret for the Vancouver occurrences and intimated the desire of Canada

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

to reach an arrangement with Japan whereby immigration from that country would be restricted to a moderate number annually. A little later the premier, in reply to a resolution passed by the Canadian Trades and Labor Congress at Winnipeg asking for the abrogation of the treaty with Japan, said that any precipitate action might be regrettable but promised a thorough investigation of the increasing Asiatic immigration. The Cabinet announced in October its intention of sending Mr. Lamieux, minister of labor, to discuss the immigration question with the Japanese government. —On August 29 the superstructure of the southern section of the great cantilever bridge in course of construction over the St. Lawrence nine miles above Quebec suddenly collapsed when a locomotive with three cars of iron material ran on to the bridge. The number of victims was about eighty.— Latest estimates of the western wheat crop give 40 million bushels fit for milling and 25 million of inferior quality. The price of wheat in Winnipeg is the highest known.

AUSTRALASIA.—The annual **Conference of the Australian Premiers**, convened at Brisbane on May 27, resolved that equal trade privileges should prevail for all nationalities in the Pacific and that regulations discriminating against Australian traders should be annulled, and disapproved of transferring the Northern Territory to the Commonwealth. Sir John Forrest suggested that the federal government assume the state debts, amounting to £220,000,000.—Lord Northcote, in opening the **Federal Parliament** on July 3, announced proposals for the encouragement of new industries by a bounty, foreshadowed defence measures, and declared the appointment of a high commissioner to be urgent. The Judiciary Bill was passed in September, making the Federal High Court the final interpreter of the constitution. The salaries of legislators have been increased to £600. The government now has a scheme before Parliament intended to secure to workingmen a share in the proceeds from the protective policy. Sir John Forrest resigned the federal treasurership on July 30. The High Court has refused to allow appeal to the Privy Council from its decision that federal servants are not liable to pay income taxes.—The Supreme Court of **New South Wales** having decided that state government imports are not liable to duty, the Sydney police force in August seized a quantity of imported wire netting on which duty had not been paid. The incident caused an angry interchange of telegrams between the state and federal officials. The state campaign was conducted with much bitterness, mainly on the issue of the federal tariff, and resulted in the election of 55 Ministerialists, 29 Labor Members, and 6 Independents. The resignation of Mr. Carruthers, the premier, who represented the extreme states' right view, early in October, and the succession of Mr. C. G. Wade promise to relieve the situation. The state Parliament reassembled on October 9.—The Parliament of **Western Australia**, which opened on October 8, is considering the income tax and a modified land tax.—The **New Zealand** budget, introduced on July 16, increased the land tax, while making numerous

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

reductions in other taxes. The Legislative Council in August rejected by a close vote the bill passed by the House making the Council elective by the House and declaring women eligible for membership. The Court of Appeal, in reversing the decision of a lower court, has affirmed that strikers refusing to pay a fine imposed on them for taking part in a strike are liable to imprisonment. Organized labor is strongly opposing the bill to amend the Arbitration Act. The *Royal Gazette* of September 10 contained a royal proclamation, declaring that the Colony of New Zealand shall be called the Dominion of New Zealand.

SOUTH AFRICA.—Federation is strongly agitated in all the colonies. Lord Selborne, the high commissioner, issued a memorandum on July 3, urging that South African fiscal, labor and railway problems can only be solved by speedy federation. His opinion received the endorsement of the government of each separate colony, the Transvaal creating a flutter in England by adding the hope of extending "the comity of South African coöperation to the friendly Portuguese province of Mozambique." The report of the Inter-Colonial Defence Committee, published in July, recommended that in case of war or disturbance any colony should requisition from the others such forces as were not required within their own borders. The different colonies have provisionally adjusted their railroad rates to meet the differential reduction of ocean freights.—Federation and "national union" were emphasized at the opening of the Parliament of **Cape Colony** in June. A bill has been passed to prevent monopoly in the meat trade; and Dr. Jameson, the premier, has asked a mandate to amend the constitution so as to prevent the blocking of financial bills by the Legislative Council. A new moderate party has been formed, called the South African Unionist party; also a "South African Nationalist Alliance," which is to pursue an active campaign throughout the country with the objects of inducing people to purchase colonial instead of imported goods and of obtaining a protective tariff.—The **Transvaal** Parliament, which was in session from June 14 to August 20, sustained the government's policy of Chinese exclusion, provided for sending home the Chinese now in the Transvaal on the expiration of the contracts, adopted an education bill and voted to present the Cullinan diamond to the king. The government bill permitting the sale of intoxicants to natives at the mines encountered so much opposition that it was withdrawn. There have been labor troubles on the Rand; and a recrudescence of Chinese outrages is reported, attributed to the unrest caused by repatriation.—The constitution of the **Orange River Colony** was promulgated on July 1.—In opening the parliament of **Natal** on June 25, the administrator said that federation was the most important question. The new governor, Sir Matthew Nathan, was enthusiastically received at Durban on September 1. A party of 25 noted native rebels were despatched from Natal on June 1 for St. Helena. The Hottentot leader Morenga was killed in a fight with a British force in September.—The

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

British Admiralty agreed on June 14 that the **naval contributions** of Cape Colony and Natal shall be spent locally.

INDIA.—Serious rioting occurred repeatedly in Eastern Bengal during the summer months, the sedition being confined, according to the London *Times*, to the educated middle class "who are carrying on a systematic propaganda among the peasantry." The government has been prosecuting a number of Hindus for publishing seditious literature. In July the editor of the Calcutta *Yugantar* was sentenced to a year's hard labor for preaching armed revolt, and in September the printer of the *Bande Mataram* was sentenced to three months' rigorous imprisonment on a similar charge. On October 2 a riot at Calcutta, in connection with an open-air demonstration in honor of students recently punished for assaulting the police, was accompanied by considerable bloodshed. Mr. Keir Hardie, M. P., the Labor leader, who toured Eastern Bengal in October, is reported to have said that the condition of the country is worse than that of Russia and that he will help to make India a self-governing colony.—**The army reorganization**, which went into effect on June 1 (see last RECORD, p. 384), substitutes for the former three departments a northern and a southern command, each under a general officer.—The government has appointed a special committee to prepare a scheme of devolution of financial and other departmental control and to report to a royal commission which will be chosen at an early date.

OTHER DEPENDENCIES.—The British government in May gave £150,000 and loaned £800,000 to aid in the economic rehabilitation of **Jamaica**. An earthquake overthrew several buildings at Port Royal on June 13.—Officials in **British East Africa** have been punished for flogging natives at Nairobi.—A British order in council of July 6 changed the designation of the British Central African Protectorate to the **Nyasaland Protectorate** and provided for the appointment of a governor and a commander-in-chief in place of the commissioner and for the nomination of executive and legislative councils. (For Egyptian affairs, see *infra*, p. 776, AFRICA).

V. CONTINENTAL EUROPE.

FRANCE.—The Chambers reassembled on May 7 and resumed the labor debate. M. Clemenceau denied being antagonistic to the principles of labor-unionism, but strongly opposed what he termed the disorderly revolutionary program of the General Confederation of Labor. After heated debate, the Chamber expressed confidence in the government by a vote of 343 to 210.—In May the **wine-growers of the Midi**, injured by overproduction and adulteration of wine, demanded assistance from the government and emphasized their demands by great popular demonstrations at Narbonne, Carcassonne, Perpignan and Montpellier. The peasants, under the guidance of Marcelin Albert, a wine-grower of Argelliers, announced to Premier Clemenceau that unless their demands were granted by June 10 they would refuse to pay taxes. The threat was carried out; the

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

mayors and municipal councillors of a number of the cities of the region resigned; and for a time the whole wine-growing district was given over to anarchy. Legislation against wine adulteration was passed through Parliament, and troops were dispatched to the scenes of violence. Upon the arrest of M. Albert and Dr. Ferroul, mayor of Narbonne, order was restored; not, however, until there had been some loss of life and property, several mutinous outbreaks in the army and some exciting scenes in the Chamber of Deputies. The agitators were subsequently set at liberty.—On July 12 the Chambers adjourned for the summer vacation, leaving the proposed income-tax law still under discussion.—Two shots were fired at President Fallières as he was returning from the military review in connection with the national *fête* on July 14, by a man thought to be insane.—In July General de Lacroix was appointed virtual generalissimo of the army in place of General Hagron. Major Dreyfus retired from the army in September.—The government has been troubled by the **anti-militarists**. M. Jaurès delivered a bitter anti-militarist speech at a Socialist meeting in Paris early in September, and on the 12th M. Hervé urged the people not to sacrifice their skins even in case of war with the Prussians. Several anti-militarists have been sentenced to various terms of imprisonment. Speeches against anti-militarism have been made by M. Méline, conservative republican, by M. Briand, the socialistic minister of education, and by the premier. A congress of the Radical-Socialist groups, which dominate the coalition majority in Parliament, adopted at Nancy on October 11 a resolution of M. Pelletan condemning anti-militarism.—October floods in the south were more serious than any since 1856, causing immense destruction of property and considerable loss of life.—The July **elections** to the councils-general resulted in heavy losses to the reactionaries and conservative republicans and corresponding gains to the other republicans.—The Chambers reopened on October 22. The cabinet announced bills to facilitate the devolution of church property to the communes, to reform the military courts-martial and to provide an income tax.

GERMANY.—The Reichstag adjourned on May 14 until November 19. In June Herr von Bethmann-Hollweg succeeded Count von Posadowsky as imperial home secretary, and in October Herr von Schön succeeded Herr von Tschirschky as foreign secretary.—The year's naval contracts, amounting to over 35 million dollars, have been placed with private yards.—The new imperial taxes have thus far not furnished the expected revenue, and will doubtless be altered by the Reichstag.—The government has repealed the ordinance of July, 1905, which prohibits the export of arms and ammunition to Abyssinia.—The emperor in a speech at Münster on August 31 appealed for national unity, which he declared could be attained only through religion. On September 1 he reviewed the fleet at Wilhelmshaven, and on the 23d unveiled at Memel a memorial emblematic of the gradual rise of Prussia since 1807.—Herr von Moltke, governor of East Prussia, was appointed in June Prussian minister of the interior.—Action for libel

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

brought by Count Kuno von Moltke, former military governor of Berlin, against Herr Harden, editor of the socialistic *Zukunft*, for articles accusing the count of belonging to a court circle which was trying to influence the emperor in political affairs, but whose members were themselves guilty of gross immorality, created a social and political sensation in October. The defendant was acquitted and the plaintiff was ordered to bear the costs of the trial.—In July outrages were committed against the Danes in Schleswig-Holstein, and it was reported that the Prussian government was likely to undertake the compulsory expropriation of Polish landowners in East Prussia.—Duke John Albrecht of Mecklenburg-Schwerin was chosen regent of **Brunswick** in May.—Herr Gruber, the editor of the Socialist *Münchener Post*, was fined in July for libel against Dr. Peters. This was a revival of a celebrated case, and brought out some extraordinary testimony on **German colonization in Africa**.—According to official statistics published in July the total casualties in the three and one-half years' campaign in German Southwest Africa amounted to 2348 officers and men, in 295 engagements, 88 against the Hereros and 207 against the Hottentots.

AUSTRIA-HUNGARY.—A new customs agreement between Austria and Hungary was signed on October 8, which seems certain of ratification. The agreement raises the Hungarian quota from 34.4 to 36 per cent, and will be in force twelve years.—The first general elections under universal suffrage for members of the **Austrian Reichsrath** were held in May, and resulted in the choice of 83 Social Democrats, 67 Christian Socialist Anti-Semites, 29 German Clericals, 24 German Radicals, 23 German Progressives, 21 German Agrarians, and 152 others divided among some fifteen groups. The Reichsrath was opened on June 19 by the emperor, who laid stress on the new responsibilities imposed on all citizens by the enjoyment of the franchise. His speech foreshadowed a long series of measures and especially urged the need of a settlement of the language question. Dr. Weiskirchner, a Christian Socialist, was elected president of the Chamber.—The completion of the five-mile railway tunnel through the Tauern range on July 21 opened up a new Alpine route from southern Germany through western Austria to Trieste.—The **Hungarian** government has had to deal chiefly with agrarian and Croatian problems. The Chambers in June passed a reactionary measure intended to prevent emigration and the spread of agrarian socialism. It gives farmers and landowners extraordinary powers over laborers and their families and even permits corporal chastisement of employees.—The conflict between the Magyar government and the **Croats** is serious. On July 3 M. Kossuth, minister of commerce, moved that only Hungarians knowing the Magyar language should be employed by railroads in the Hungarian crown-lands. The measure passed the Chambers, and the Croats withdrew in a body. The Croatian Diet was prorogued *sine die* by royal rescript. Count Pejacsevich, who has been ban of Croatia since 1903, resigned on account of the conflict and was succeeded by M. de Rakodezay, a pronounced Unionist, who is

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

regarded with little favor by the Croats.—Negotiations which have been pending since 1900 between the imperial administration and the Mahommedans of **Bosnia and Herzegovina** respecting Mussulman autonomy in educational and religious matters were broken off in July.

RUSSIA.—In the **Duma** on May 20 M. Stolypin, the premier, gave details of a plot against the czar, Grand Duke Nicholas and himself, of which the members expressed their abhorrence, the Socialists and Toil group absenting themselves. On May 28 and 30 the Duma rejected resolutions condemning terrorism and on June 8 began to discuss the reform of rural justice. At a secret sitting on June 14 M. Stolypin presented charges of treason against practically all the members of the Social Democratic party and demanded the immediate arrest of sixteen and authority for the indictment of fifty-five members. By an overwhelming majority the charges were referred to a committee. Early on Sunday morning, June 16, the czar signed a ukase dissolving the second Duma and fixing the meeting of the third Duma for November 14. At the same time in direct defiance of one of the essential guaranties of the constitution, the czar promulgated a new election law, reducing the peasant electorate, diminishing by half the number of deputies from Poland, the Caucasus and Siberia, and instituting in the larger cities direct elections with a higher property test. This *coup d'état* placed four-fifths of the electing power in the hands of 130,000 landowners, the majority of whom are reactionary. Octobrists as well as Constitutional Democrats were amazed at the new law, but the country remained comparatively calm. M. Dubrovin, president of the Union of the Russian People, telegraphed to the czar the union's gratitude for his action in dissolving the "criminal" Duma. Many of the Socialist and Toil deputies were arrested after the *coup d'état.*—**Disorders** have continued throughout Russia. In June a serious mutiny occurred at Kieff, and terrorists robbed a treasury van in Tiflis of $160,000. In July there were agrarian disturbances in the provinces of Kherson and Kostroma, and General Alikhanoff was assassinated at Alexandropol. General Karangosoff, formerly governor-general of Odessa, was assassinated on August 5.—In July the government outlined a scheme for the speedy distribution of 25 million acres of the state land reserve to the peasants, and approved the appropriation in the 1908–1911 budget of 31 million roubles yearly for the construction of warships.—The **Zemstvo Congress**, which was opened at Moscow on June 23 and reassembled in September, is controlled by the conservatives and has attacked M. Stolypin's proposal for the extension of the zemstvo system.—The results of the October **elections** show that the third Duma will be strongly conservative and will support M. Stolypin. Siberia and St. Petersburg return Social Democrats.

ITALY AND THE HOLY SEE.—A parliamentary committee in May reduced to £2,250,000 the £8,000,000 demanded by the war minister for the army.—The centenary of Garibaldi's birth was celebrated throughout Italy on July 4. A movement is on foot to make national monuments of

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

the house and burial-place of the hero on the island of Caprera.—Municipal elections in Rome on June 30 resulted in a sweeping victory for the Advanced Liberals.—**The anti-clerical movement** seems to be gaining ground. Cardinal Merry del Val, the papal secretary of state, and other ecclesiastics have been openly attacked and insulted. The pope has directed the abandonment for the present of pilgrimages to Rome.—On July 17 Pius X issued a **syllabus** of sixty-five errors concerning faith, the scriptures and the ecclesiastical authority. The syllabus condemns the "modernist" tendency among Roman Catholic writers, *i. e.*, the tendency to explain dogma by historical development. On September 16, the syllabus was complemented by a papal encyclical on "modernism," which orders: (1) teaching to be carried on in a Catholic spirit, (2) the removal of modernists from educational positions, (3) the suppression of modernist publications, (4) the institution of a committee on censorship in every diocese, (5) the suspension of most ecclesiastical congresses, and (6) the formation of a special council in every diocese to combat modern errors.—Pope Pius in May directed a revision of the Vulgate and entrusted the work to the Benedictine Order. In October Abbot Gasquet, head of the English Benedictines, was appointed chairman of the revision committee.—Diplomatic relations between the **Holy See** and **Bolivia** were broken off in August on account of Bolivia's efforts to limit clerical privileges and introduce civil marriage.

OTHER EUROPEAN STATES.—Queen Victoria of **Spain** gave birth to a son on May 10. At the Spanish opening of the Cortes on May 13, King Alphonso announced the purpose of the ministry of marine to spend eight million pounds sterling in eight years for reorganizing the arsenals and providing a few modern ships. Three of the anarchists tried in June for complicity in the bomb outrage on the king's wedding-day (May 31, 1906) were sentenced to nine years' imprisonment. To the families of those killed by the explosion, the Cortes voted life annuities.—In **Portugal**, the suspension of constitutional government has continued. Premier Franco, in a speech at the Liberal Club in May, stated that the present government was only of a transitory character, and that as soon as all parties knew how to perform their duty Parliament would be opened. In June royal decrees replaced the Lisbon municipal council by an administrative commission and closed the republican clubs. The Supreme Tribunal of Justice on July 16 gave unanimous judgment in favor of the validity of the non-parliamentary decrees. A decree issued in September provided for pensions and loans to artisans, who will contribute 20 reis daily to a fund which is to be raised by these contributions, by a tax levied upon employers and by a state subvention. A decree issued in October postponed municipal elections until after the application of the new reformed administrative code.—The crown prince made a tour during August and September through the **Portuguese colonies** in Africa and through British South Africa. On May 23 the King signed the decree granting autonomy to

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Mozambique. The seat of government is fixed at Lorenzo Marques. This is the first Portuguese colony to receive representative government. During August and September the Portuguese had several engagements with the Cuamatas.—On July 23 King Leopold of **Belgium** opened the new port of Zeebrugge, which is the sea terminus of the Bruges ship canal. Antwerp was troubled in September by a dockers' strike.—On September 17 Queen Wilhelmina opened the States-General of the **Netherlands**. The legislative program, as then outlined, includes the amendment of the constitution with a view to the reform of the electoral law, the improvement of coast defences, the partial draining of the Zuyder Zee, workingmen's insurance and a system of meat inspection.—The **Luxemburg** Chamber has passed a succession and regency bill, whereby the succession is to devolve upon the grand duke's daughters and their descendants in order of birth, and in case of a regency the grand duchess will act.—King Frederick of **Denmark**, accompanied by Premier Christensen, paid a visit in July to Iceland, where the question of home rule is agitated.—The Storthing of **Norway** passed a woman suffrage bill in June, granting the franchise to women under the same conditions as those under which they already had votes in municipal elections. The act increases the Norwegian electorate by about 300,000.—In May the Parliament of **Sweden** passed a reform bill establishing universal suffrage and proportional representation. In August the government created a committee of 100 to devise ways and means of preventing emigration.—The cantonal referendum in Geneva, **Switzerland** about the first of July on the proposal for the separation of church and state resulted in the endorsement of the measure by 7656 votes to 6822.—Frequent outrages are reported from **Macedonia**. The Greek, Bulgarian and Servian communities terrorize each other, and the Turkish government seems to be unable to quell the disorders. Bulgaria has demanded the speedy withdrawal of Servian bands from Macedonia, and Greece has addressed a protest to the great powers against the Bulgarian bands. On October 21 a Bulgarian band destroyed the Greek village of Bakoven, near Monastir, burning more than a hundred houses and killing several inhabitants.—The June elections in **Rumania** gave the premier, M. Sturdza, a large majority in both houses and placed him in a position to carry out the important series of agrarian reforms announced last March. Fifty-eight soldiers were condemned in July to hard labor for life for having refused to fire on the peasants during the agrarian disorders (see last RECORD, p. 382). Rumania resumed diplomatic relations with Greece in July.—Floods caused great loss of life in **Thessaly** in June.—M. Zaimis, high commissioner of **Crete**, conferred in July with the premier of Greece about the selection of twenty-six Greek officers who will be entrusted with the organization of a Cretan militia to take the place of the international troops now in Crete. The Christian members of the Cretan Chamber, which opened on July 13, passed a resolution asking the powers to sanction the union of the island with Greece.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

VI. ASIA AND AFRICA.

JAPAN.—The final ceremony of the distribution of war rewards among generals, admirals and high state officials took place at Tokio on September 21 in the presence of the Emperor. Admiral Togo was created a count.—The ministry has approved Prince Ito's program for the reform of the **Korean** administration.—The Japanese advance in **Formosa** captured the chief native stronghold at Chintozan on June 13, with a loss of 250 men.

CHINA.—An insurrection in the vicinity of Amoy was easily suppressed in June.—Chu Hung-chi, president of the Ministry of Foreign Affairs, was dismissed in June for incompetence, and was succeeded by Lu Hai-huan.—The imperial government perseveres in its crusade against the opium habit (see last RECORD, p. 384). All the powers except Japan have agreed to enforce the prohibition on the importation of morphia except for medical purposes. All opium dens in Canton were closed in August without disturbance.—The government is superintending the reorganization of the **Tibetan** army.—On July 1 a Chinese custom-house was opened at Dalny, and in August China gave notice of the opening to international trade of seven additional cities in **Manchuria**, thereby completing the total of sixteen cities provided for in the China-Japanese treaty of 1905.—Several important **reform decrees** have recently appeared. In September commissioners were appointed to proceed to Great Britain, Germany and Japan to study the constitutional systems of those countries. In October a uniform system of weights and measures was decreed throughout the empire; and the provinces were commanded to erect adequate legislative buildings and the governors to select temporary representatives preliminary to the institution of constitutional government.

PERSIA.—The Persian rebels were defeated early in June, and their leader, the shah's brother, Salar-ed-Dauleh, surrendered to the governor of Hamadan.—The new Persian **Parliament** was opened on May 4 by the premier, Amin-es-Sultan, who promised to work with it and assured it of the shah's intention to act according to the constitution. Parliament in July secured the dismissal of the minister of war, who is an uncle of the shah, and granted the German bank a concession for thirty years. Premier Amin-es-Sultan was assassinated on leaving Parliament, August 31, and shah and Parliament have thus far failed to agree on his successor. In fact, the inexperience of the Parliament, the cabinet crisis, the political and social unrest in the country and the presence of Turkish troops on the western frontier have conspired to produce a situation so critical that joint Russo-British action to restore order is reported as imminent.

OTHER ASIATIC STATES.—Conflicts between **Turkish** troops and other Arab tribes in the region of the Euphrates and Tigris have been numerous, and in the fighting Persian territory has been repeatedly invaded. Fighting was reported in June between the Turks and Armenians.—Tanh Taï, King of **Annam**, was deposed in August for his dissolute

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

habits, and a regency was appointed under the direction of the French resident-general. (For events in India, see THE BRITISH EMPIRE.)

AFRICA.—In **Egypt** over one hundred notables, including the vice-president of the Legislative Council, met in September under the presidency of Hassan Pasha Razik and assumed the name "Founders of the People's Party." They resolved to urge the development of existing institutions, the reform of education and the encouragement of agriculture and trade, with a view to obtaining in due course autonomy and eventually independence for the country.—The administration of the **Congo Free State** issued in June a long report denying that the natives are ill-used and referring to the "mendacious assertions of the foreign press and the incorrect statements of certain Protestant missionaries." It is supplemented by a favorable report from Mr. Mitchell, the British vice-consul at Stanleyville. On July 20 a Belgian company was chartered for the development of the territories in the basin of Lake Leopold II.—Pursuant to the recently amended constitution, Arthur Barclay was reëlected president of **Liberia** on May 7 for four years. His policy of reorganizing the customs service under European officials was emphatically endorsed by popular vote. (For European colonies in Asia and Africa, see the respective European states, *supra*, pp. 768–774.)

C. A. BEARD,
C. H. HAYES.

COLUMBIA UNIVERSITY.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED